



NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

ARTURO GONZALEZ,

Debtor.

Case No. 2:15-bk-25283-RK

Chapter 7

**MEMORANDUM DECISION AMENDING
PRIOR DECISIONS AFTER TRIAL ON
CONTESTED MATTER OF THE
CHAPTER 7 TRUSTEE'S MOTION
OBJECTING TO THE DEBTOR'S
CLAIMED HOMESTEAD EXEMPTION IN
REAL PROPERTY LOCATED AT 329
HAWAIIAN AVENUE, WILMINGTON, CA
AND RULING ON CONTESTED MATTER
OF CHAPTER 7 TRUSTEE'S MOTION
OBJECTING TO DEBTOR'S AMENDED
CLAIMED HOMESTEAD EXEMPTION
ON SAME PROPERTY AND TOOLS OF
THE TRADE EXEMPTION**

Pending before the court are: (1) the Motion of Wesley H. Avery, the Chapter 7 Trustee ("Trustee") Objecting to the Debtor's Claimed Homestead Exemption in Real Property Located at 329 Hawaiian Avenue, Wilmington, California ("Original Objection Motion"), Electronic Case Filing Number ("ECF") 96, filed on June 8, 2016; and (2) Trustee's Motion Objecting to Debtor's Amended Schedules filed December 12, 2017 to Claim a Homestead Exemption in Real Property at 329 Hawaiian Avenue, Wilmington,

1 California, and to Claim a Tools of the Trade Exemption in Commissions (“Amended
2 Objection Motion”), ECF 241, filed on January 8, 2018.

3 Debtor Arturo Gonzalez (“Debtor”) filed a written opposition to the Original
4 Objection Motion on June 24, 2016, ECF 113, and Trustee filed a reply thereto on June
5 30, 2016, ECF 115. The Original Objection Motion initially came on for hearing before
6 the undersigned United States Bankruptcy Judge on July 7, 2016. At that hearing, the
7 court determined that since the Original Objection Motion raised disputed factual and
8 legal issues, it would treat it as a contested matter under Rule 9014 of the Federal Rules
9 of Bankruptcy Procedure. On August 17, 2016, the court conducted an evidentiary
10 hearing on this contested matter. Brett B. Curlee, of the Law Offices of Brett Curlee,
11 appeared for Trustee, and Anerio V. Altman, of Lake Forest Bankruptcy Law Office,
12 appeared for Debtor. Following the evidentiary hearing, the court ordered the parties to
13 file supplemental briefs addressing the issue of whether Debtor is barred by the doctrines
14 of judicial estoppel and/or collateral estoppel from switching from the so-called
15 “bankruptcy-like” exemptions claimed under California Code of Civil Procedure (“C.C.P.”)
16 § 703.140(b) to regular California non-bankruptcy exemptions claimed under C.C.P.
17 § 704.010 *et seq.*, and C.C.P. § 704.730 after a final judgment had been entered allowing
18 the previously claimed C.C.P. § 703.140(b) exemptions. *See Order after Hearing on*
19 *Motion by the Chapter 7 Trustee Objecting to the Debtor’s Claimed Homestead*
20 *Exemption*, ECF 145, filed and entered on August 23, 2016; *see also* 1 March, Ahart and
21 Shapiro, *California Practice Guide: Bankruptcy*, ¶ 2:601 at 2-84 (2018) (“California
22 debtors may choose between two sets of state law exemptions, the regular
23 nonbankruptcy exemptions (Calif. C.C.P. § 704.010 *seq.*) or the bankruptcy-like set of
24 exemptions (Calif. C.C.P. § 703.140(b)). They may *not* use the exemptions contained in
25 the Bankruptcy Code (11 USC § 522).”) (emphasis in original), *citing*, 11 U.S.C. § 522; 11
26 U.S.C. § 522(b)(1); C.C.P. § 703.140(a) and (b). The court ordered Debtor to file a
27 supplemental brief by November 4, 2016 and Trustee to file a supplemental brief by
28 November 18, 2016. Following the supplemental briefing, the court authorized Debtor to

1 file a reply to Trustee's supplemental brief by November 30, 2016, and thereafter the
2 matter would be deemed under submission. *Id.* On November 4, 2016, Debtor through
3 counsel filed his supplemental brief, ECF 156, and filed a request for judicial notice in
4 support thereof, ECF 157. On November 30, 2016, Trustee filed his supplemental reply
5 brief. ECF 163.

6 On November 6, 2016, Debtor filed a substitution of attorney substituting himself
7 for his counsel, ECF 158. At a status conference in a related adversary proceeding on
8 November 15, 2016, Debtor requested that the court extend the deadline for Debtor to file
9 his reply brief in response to the Trustee's supplemental brief, and at this hearing Trustee
10 consented to the extension of time allowing Debtor to file his reply by January 31, 2017.
11 *See Amended Order on Motion by the Chapter 7 Trustee Objecting to the Debtor's*
12 *Claimed Homestead Exemption in Real Property*, ECF 161, filed and entered on
13 November 18, 2016. Debtor failed to file the reply brief by this deadline, so the matter
14 was deemed submitted as of February 1, 2017.

15 On June 27, 2017, the court issued two memorandum decisions and two orders on
16 the Chapter 7 Trustee's original motions objecting to Debtor's claimed homestead
17 exemption and "tools of the trade" exemption. ECF 202-205. The court ruled that Debtor
18 was not entitled to claim a homestead exemption under C.C.P. § 704 based on equitable
19 estoppel principles. The court also ruled that Debtor was not entitled to claim a "tools of
20 the trade" exemption with respect to his real estate sales commissions under C.C.P.
21 § 704.

22 On July 11, 2017, Debtor filed his motion for reconsideration of the orders granting
23 Trustee's motions disallowing the claimed homestead exemption and "tools of the trade"
24 exemption. ECF 210. On August 1, 2017, Trustee filed his opposition to Debtor's motion
25 for reconsideration. ECF 212. On August 2, 2017, the court filed and entered its order
26 granting Debtor's motion for reconsideration, staying the prior orders pending
27 reconsideration in light of the opinion of the United States Court of Appeals for the Ninth
28 Circuit in *In re Lua*, 692 Fed. Appx. 851 (9th Cir. 2017), which reversed the orders of the

1 lower courts upon which this court had cited in its memorandum decisions disallowing
2 Debtor's exemptions. In this order, the court set a schedule of further briefing from the
3 parties regarding the impact of the Ninth Circuit's opinion in *Lua*.

4 By order filed and entered on September 27, 2017, the court granted Debtor's
5 request to extend time to file his supplemental brief. ECF 218. On November 7, 2017,
6 Debtor filed his supplemental brief on his right to claim a homestead exemption. ECF
7 222.

8 On December 12, 2017, Debtor filed an amended Schedule C: The Property You
9 Claimed as Exempt (Official Form 106C) to claim a homestead exemption of \$100,000,
10 ECF 229, amending his claim of exemptions to increase the homestead exemption from
11 the \$75,000 claimed on his amended Schedule C filed in May 2016, see ECF 85. On
12 December 15, 2017, Debtor filed a motion requesting that the court's rulings denying his
13 homestead exemption be set aside pursuant to *In re Lua* and based on misconduct of
14 Trustee for failing to object to untimely creditor claims in light of the May 2017 decision of
15 the United States Supreme Court in *Midland Funding, LLC v. Johnson*. 137 S. Ct. 1407
16 (2017). ECF 231. On December 22, 2017, Debtor filed another supplemental brief on
17 his right to claim a homestead exemption. ECF 233. On December 29, 2017, Debtor
18 filed a motion to amend his supplemental brief on his right to claim a homestead
19 exemption. ECF 238. On January 7, 2018, Trustee filed his opposition to Debtor's
20 motion to amend his supplemental brief. ECF 240.

21 On January 8, 2018, Trustee filed the Amended Objection Motion objecting to
22 Debtor's amended schedules filed on December 12, 2017, claiming the increased
23 homestead exemption of \$100,000 and a "tools of the trade" exemption. ECF 241.

24 On January 9, 2018, Debtor filed an amended responsive brief regarding his right
25 to claim a homestead exemption. ECF 246. On January 17, 2018, the court filed and
26 entered an order on Debtor's motion to amend his responsive brief on his claimed
27 homestead exemption, granting his request to amend his brief and granting additional
28

1 time for Trustee to respond. ECF 248. On January 31, 2018, Trustee filed his brief in
2 response to Debtor's amended responsive brief. ECF 253.

3 On February 1, 2018, Debtor filed a second motion to amend his responsive brief
4 regarding his claimed homestead exemption. ECF 254. On February 12, 2018, Trustee
5 filed his opposition to Debtor's second motion to amend his responsive brief. ECF 257.

6 On February 21, 2018, Debtor filed a motion to reopen discovery on the dispute
7 regarding his claimed homestead exemption and to extend time to file a reply to Trustee's
8 opposition to his second motion to amend his responsive brief. ECF 263. This motion
9 was refiled on February 23, 2018 due to a noticing defect. ECF 264. On February 27,
10 2018, Trustee filed an opposition to Debtor's motion to reopen discovery. ECF 266. On
11 February 28, 2018, the court filed and entered an order granting Debtor's second motion
12 to amend his responsive brief regarding his claimed homestead exemption. ECF 270.

13 On March 6, 2018, Debtor filed his responsive brief regarding his right to amend his
14 bankruptcy schedules to increase his claimed homestead exemption from \$75,000 to
15 \$100,000. ECF 274. Also on March 6, 2018, Debtor filed his amended responsive brief
16 regarding his right to amend his bankruptcy schedules to increase his claimed
17 homestead exemption from \$75,000 to \$100,000. ECF 275. On March 6, 2018, Debtor
18 also filed an amended motion to reopen discovery regarding the dispute over his claimed
19 homestead exemption. ECF 278. On March 29, 2018, the court filed and entered its
20 order granting Debtor's motion to reopen discovery on his claimed homestead exemption,
21 setting a deadline for completing discovery by May 31, 2018 and setting a briefing
22 schedule for Trustee's motion objecting to Debtor's amended homestead exemption
23 claim. ECF 286. This order set a deadline for further briefing and evidence to be filed by
24 Debtor by June 29, 2018, with a hearing on August 29, 2018. *Id.* On June 22, 2018, the
25 court filed and entered an order denying Debtor's motion to continue the hearing on the
26 claimed homestead exemption on August 29, 2018 due to alleged lack of compliance
27 with discovery subpoenas. ECF 312.

1 On September 5, 2018, the court filed and entered an order after the hearing on
2 Trustee's motion objecting to Debtor's amended schedules claiming an increased
3 homestead exemption and a "tools of the trade" exemption, which provided that the
4 parties could file opening supplemental briefs by September 19, 2018 and file reply
5 supplemental briefs by October 3, 2018. ECF 334. On September 19, 2018, Debtor and
6 Trustee filed opening supplemental briefs on Debtor's claim of a homestead exemption.
7 ECF 340 and 342. Also on September 19, 2018, Debtor filed a motion to extend time to
8 file a further opening supplemental brief. ECF 341. On September 28, 2018, the court
9 filed and entered an order granting Debtor's request for additional time to file an opening
10 supplemental brief and extended the time for reply supplemental briefs to October 17,
11 2018. ECF 346. On September 26, 2018 and October 3, 2018, Debtor filed two
12 additional supplemental briefs on his claim for a homestead exemption. ECF 345 and
13 349. On October 17, 2018, Debtor and Trustee filed opening supplemental briefs on
14 Debtor's claim of a homestead exemption. ECF 351 and 352. On November 9, 2018,
15 Debtor filed an amended supplemental brief on his claim to a homestead exemption.
16 ECF 362.

17 Having considered the moving and opposing papers on the Original Objection
18 Motion and the Amended Objection Motion, the exhibits and declarations attached
19 thereto, the evidence admitted at the evidentiary hearing, the oral and written arguments
20 of the parties, the parties' supplemental briefs, and the record before the court, the court,
21 in this amended memorandum decision, hereby sets forth its findings of fact and
22 conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made
23 applicable here by Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure.

24 I. FACTS

25 On October 5, 2015, Debtor filed a voluntary petition for relief under Chapter 7 of
26 the Bankruptcy Code, 11 U.S.C., commencing this bankruptcy case, *In re Arturo*
27 *Gonzalez, dba Long Beach Realty, Inc.; dba South Bay Realty; dba Mindset; aka Art*
28 *Gonzalez; aka Art Gonzalez, Jr.*, Case No. 2:15-bk-25283-RN. *Chapter 7 Voluntary*

1 *Petition*, ECF 1, filed on October 5, 2015, *Trustee's Trial Exhibit 115*. In Debtor's
2 Schedule A-Real Property, Debtor listed the real property located at 329 Hawaiian
3 Avenue, Wilmington, CA (the "Hawaiian Avenue property") which he owned in fee simple
4 with a value of \$275,000. *Chapter 7 Voluntary Petition, Schedule A-Real Property*, ECF
5 1 at 11, *Trustee's Trial Exhibit 115*.

6 Debtor's initial Schedule B-Personal Property identified his business, Long Beach
7 Realty, Inc. ("Long Beach Realty") as an estate asset. *Chapter 7 Voluntary Petition,*
8 *Schedule B-Personal Property*, ECF 1 at 13, *Trustee's Trial Exhibit 115*. Debtor on his
9 Schedule I-Your Income identified his occupation as a real estate broker and indicated
10 that he has been working in that occupation for five years at his business, Long Beach
11 Realty. *Chapter 7 Voluntary Petition, Schedule I-Your Income*, ECF 1 at 28, *Trustee's*
12 *Trial Exhibit 115*. Debtor on his Schedule B-Personal Property referred to Long Beach
13 Realty, as a "California Subchapter 'S' Corporation," having the following assets: a bank
14 account holding \$1,100, accounts receivable of \$9,500, and business equipment valued
15 at \$400. *Chapter 7 Voluntary Petition, Schedule B-Personal Property*, ECF 1 at 13,
16 *Trustee's Trial Exhibit 115*. On his Schedule C-Property Claimed as Exempt, Debtor
17 claimed a C.C.P. § 703.140(b)(5) exemption in the amount of \$10,600 representing the
18 value of Long Beach Realty's bank account and accounts receivable. *Chapter 7*
19 *Voluntary Petition, Schedule C-Property Claimed as Exempt*, ECF 1 at 17, *Trustee's Trial*
20 *Exhibit 115*. Debtor further claimed a \$400 exemption in the business equipment of Long
21 Beach Realty pursuant to C.C.P. § 703.140(b)(6). *Id.* Debtor did not claim a homestead
22 exemption in the Hawaiian Avenue property pursuant to the regular nonbankruptcy
23 California set of exemptions of C.C.P. § 704 on his first Schedule C-Property Claimed as
24 Exempt, filed on October 5, 2015, on which he chose only exemptions in personal
25 property assets pursuant to the California bankruptcy-like set of exemptions of C.C.P.
26 § 703.140(b) in the amount of \$34,650. *Id.* at 18.

27 On December 14, 2015, one day before Debtor's first continued meeting of
28 creditors pursuant to 11 U.S.C. § 341(a), Debtor filed his first amended bankruptcy

1 schedules, including an amended Schedule B-Personal Property and an amended
2 Schedule C-Property Claimed as Exempt, listing the assets of Long Beach Realty,
3 including a bank account valued at \$1,100 and business equipment valued at \$400.
4 *[First] Amended Schedule(s), Schedule B-Personal Property and Schedule C-Property*
5 *Claimed as Exempt*, ECF 18 at 3 and 7, *Trustee's Request for Judicial Notice, Exhibit 2*,
6 ECF 244, filed on January 8, 2018. On his Amended Schedule B-Personal Property,
7 Debtor added an item called "Contingent Interests at time of filing" to the list of assets of
8 Long Beach Realty, which stated a total value of \$44,303 referring to the sales of three
9 different properties, the "W. L[.] Street Sale", the "Banning Sale" and the "Oce[a]inside
10 Sale". *[First] Amended Schedule(s), Schedule B-Personal Property*, ECF 18 at 3,
11 *Trustee's Trial Exhibit 2*.¹ Again, in his First Amended Schedules, filed on December 14,
12 2015, Debtor did not claim a homestead exemption pursuant to regular California
13 nonbankruptcy set of exemptions of C.C.P. § 704 and only claimed the bankruptcy-like
14 C.C.P. § 703.140(b) exemptions in personal property assets in the amount of \$25,150.
15 *[First] Amended Schedule(s), Schedule C-Property Claimed as Exempt*, ECF 18 at 7,
16 *Trustee's Request for Judicial Notice, Exhibit 2*, ECF 244, filed on January 8, 2018.
17 However, Debtor did not claim the value of the "Contingent Interests at time of filing"
18 valued at \$44,303, as exempt on the Amended Schedule C-Property Claimed as Exempt,
19 though this item was listed as an asset on this amended exemption schedule, the
20 Amended Schedule C. *Id.* Debtor claimed exemptions in other personal property assets
21 under C.C.P. § 703.140(b) *Id.*

22 At the meeting of creditors in this case on December 15, 2015, the day after
23 Debtor filed his first amended schedules, Trustee examined Debtor under oath. *Avery*
24 *Motion Declaration*, ECF 96 at 15 (document page 14), ¶ 6, *Trustee's Request for*

25 ¹ "Contingent Interests at time of filing" referred to real estate commissions on the sales of these three
26 properties that Debtor had earned prepetition, which were the subject of the litigation involving Trustee's
27 objection to Debtor's claimed exemption in these commissions under C.C.P. § 703.140(b) and are referred
28 to herein as "Commissions." See *Declaration of Wesley T. Avery attached to the Motion ("Avery Motion Declaration")*, filed on May 13, 2016, ECF 96 at 15 (document page 14), ¶ 5, *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20, 2016, Exhibit Z1, *Trustee's Trial Exhibit 126* (this declaration of Trustee in support of the Motion was received as his further trial declaration at trial).

1 *Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit Z1, Trial Exhibit 126*. According
2 to Trustee, at this meeting of creditors Debtor testified that there were no errors or
3 omissions in his schedules, that he signed his schedules after he read them and that they
4 were true and correct, and Debtor also acknowledged that he had filed the first amended
5 schedules one day earlier on December 14, 2015. *Id.* According to Trustee, at this
6 meeting of creditors he discussed Debtor's right to make an election regarding the assets
7 that he could exempt in bankruptcy and advised Debtor, with counsel present, that he
8 had an election to make, that Debtor could either exempt the Commissions or the
9 Hawaiian Avenue property, but not both. *Id.* at 16 (document page 15), ¶ 6. At this
10 meeting of creditors, Trustee further advised Debtor that he was only entitled to an
11 exemption of \$1,500.00 in the assets of Long Beach Realty and that the rest of the
12 assets of Long Beach Realty were not exempt and belonged to the bankruptcy estate.
13 *Id.* According to Trustee, Debtor stated on the record that he agreed, and Trustee
14 instructed Debtor not to dissipate any of the assets of Long Beach Realty. *Id.* Although
15 Trustee did not offer into evidence a transcript of the proceedings at this meeting of
16 creditors, Trustee's account of his colloquy between him and Debtor at the meeting of
17 creditors as recited in the Avery Motion Declaration is credible and is not disputed by
18 Debtor as Debtor at trial raised no objections to Trustee's Declaration or any other of
19 Trustee's trial exhibits.

20 On January 15, 2016, Debtor's bankruptcy attorney, Anerio V. Altman, informed
21 Trustee's counsel, Brett B. Curlee, that Debtor had received "some" of the Commissions
22 and was using "some" to pay living expenses and was holding the rest to, among other
23 things, pay the mortgage or home loan on the Hawaiian Avenue property for when the
24 case was converted to one under Chapter 13 of the Bankruptcy Code. *Declaration of*
25 *Brett B. Curlee attached to the Motion ("Curlee Motion Declaration")*, filed on May 13,
26 2016, ECF 96 at 24 (document page 22), ¶ 3, *Trustee's Request for Judicial Notice*, ECF

1 111, filed on June 20, 2016, *Exhibit Z1, Trustee's Trial Exhibit 126*.² After this telephone
2 conversation, on the same day, Trustee's counsel sent an email to Debtor's counsel
3 demanding that Debtor not spend the Commissions which belonged to the bankruptcy
4 estate and instructing that Debtor not use the Commissions to pay for post-bankruptcy
5 living expenses, and within 90 minutes, Debtor's counsel sent an email to Trustee's
6 counsel, responding that Debtor would not comply with the Trustee's requests in light of
7 Debtor's pending motion to convert the case to one under Chapter 13 of the Bankruptcy
8 Code. *Id.* at 25 (document page 23), ¶¶ 4-5, and Exhibit 15 attached thereto. According
9 to an analysis by Trustee's accountant of the bank account of Debtor's business, Long
10 Beach Realty, Debtor made disbursements totaling \$33,883.52 from this account from
11 the petition date of October 5, 2015 to January 15, 2016, which included \$21,178.00
12 derived from two checks for commissions for the Banning Sale deposited on December
13 3, 2015 and January 7, 2016. *Declaration of John J. Menchaca attached to the Motion*
14 *("Menchaca Motion Declaration")*, filed on May 13, 2016, ECF 96 at 28-29 (document
15 pages 25-26), ¶¶ 2-4, *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20,
16 2016, *Exhibit Z1, Trustee's Trial Exhibit 126*.³ In a letter to Trustee's counsel (Mr. Curlee)
17 emailed on February 11, 2016, Debtor's counsel (Mr. Altman) confirmed that Debtor
18 cashed two checks from sales commissions from the Banning Sale in the amount of
19 \$20,178.00 on December 3, 2015 and January 6, 2016. *Curlee Motion Declaration*, ECF
20 96 at 24 (document page 22), ¶ 3 and ECF 96-1 at 6-8, *Trustee's Trial Exhibit 126*.

21 On January 21, 2016, Trustee initiated the adversary proceeding against Debtor
22 entitled *Wesley H. Avery v. Arturo Gonzalez, dba Long Beach Realty, Inc.; dba South*
23 *Bay Realty; dba Mindset; aka Art Gonzalez; aka Gonzalez Jr.*, Adv. No. 2:16-ap-01037-
24 RK ("Adversary Proceeding") seeking turnover of these Commissions to the bankruptcy
25 estate. In the Adversary Proceeding for turnover, Trustee filed a motion for temporary
26

27 ² This declaration of Trustee's counsel in support of the Motion was received as his further trial declaration
at trial.

28 ³ This declaration of Trustee's accountant in support of the Motion was received as his further trial
declaration at trial.

1 restraining order, turnover, and an application for an order shortening time on such
2 motion. *Motion by the Plaintiff and Chapter 7 Trustee for Turnover of Funds, Accounting,*
3 *Temporary Restraining Order, and Preliminary Injunction and Application for Order*
4 *Setting Hearing on Shortened Notice*, Adversary Proceeding ECF 2 and 3, filed on
5 January 22, 2016. Trustee filed this motion because he learned that Debtor had received
6 the money for the Commissions and had spent the portion of this money belonging to the
7 bankruptcy estate. *Avery Motion Declaration*, ECF 96 at 17-18 (document pages 16-17),
8 ¶¶ 10-13, *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit*
9 *Z1, Trustee's Trial Exhibit 126*. The court granted Trustee's request for a temporary
10 restraining order by an order entered on January 25, 2016, and the court set a hearing on
11 Trustee's request for issuance of a preliminary injunction and turnover on February 17,
12 2016. *Order on (1) Ex Parte Motion by Chapter 7 Trustee Without Notice for Turnover of*
13 *Funds, Accounting, and Temporary Restraining Order . . . and (2) Setting Hearing,*
14 Adversary Proceeding ECF 5, filed and entered on January 25, 2016, *Trustee's Request*
15 *for Judicial Notice, Exhibit 3*, ECF 244, filed and entered on January 8, 2016.

16 On February 3, 2016, Debtor filed his opposition to Trustee's turnover motion,
17 referring to "Exhibit A" attached to the opposition, which consisted of draft amended
18 bankruptcy schedules to be filed on February 4, 2016, and stating, "The debtor will
19 turnover nonexempt funds described as 'real estate commissions' less **those amounts**
20 **retained as an exemption pursuant to the Debtor's amendments to be filed on**
21 **February 4th, 2016** The Debtor requests a court ruling on whether the 'exempted'
22 funds also need to be turned over to the Trustee pending resolution of the Adversary
23 Proceeding." *Response to the Trustee's Request for Injunctive Relief*, Adversary
24 Proceeding ECF 14, filed on February 3, 2016 at 2, *Trustee's Request for Judicial Notice,*
25 *Exhibit 4*, ECF 244, filed on January 8, 2018 (emphasis added). Part of Exhibit A
26 attached to Debtor's response to Trustee's turnover motion was a draft Schedule C –
27 Property Claimed as Exempt, claiming an exemption of \$21,125 in real estate
28 commissions pursuant to C.C.P. § 703.140(b)(5). *Id.*, Exhibit A attached thereto. In

1 other words, Debtor represented in his filed opposition to Trustee's turnover motion that
2 he was claiming, retaining, and not turning over, personal property assets, namely, his
3 real estate commissions as exempt pursuant to C.C.P. § 703.140(b)(5) on his proposed
4 second amended bankruptcy schedules to be filed the next day on February 4, 2016. *Id.*

5 On February 4, 2016, Debtor further amended his Schedule B-Personal Property
6 and Schedule C-Property Claimed as Exempt, also only claiming exemptions in personal
7 property assets pursuant to the California bankruptcy-like set of exemptions under C.C.P.
8 § 703.140(b)(5) and (6). *Summary of Amended Schedules, Master Mailing List, and/or*
9 *Statements [LBR 1007-1(c)], Schedule B-Personal Property and Schedule C-Property*
10 *Claimed as Exempt*, ECF 45 at 3-9, *Trustee's Request for Judicial Notice, Exhibit 5*, ECF
11 244, filed on January 8, 2018. On these Second Amended Schedules, Debtor claimed as
12 exempt a total of \$28,750 in the Commissions from Long Beach Realty, of which \$21,125
13 was claimed exempt pursuant to C.C.P. § 703.140(b)(5) and \$7,625 was claimed as
14 exempt pursuant to C.C.P. § 703.140(b)(6), the "tool of the trade" exemption, which funds
15 were deposited in Long Beach Realty's bank account. *Summary of Amended*
16 *Schedules, Master Mailing List, and/or Statements [LBR 1007-1(c)], Schedule C-Property*
17 *Claimed as Exempt*, ECF 45 at 8, *Trustee's Request for Judicial Notice, Exhibit 5*, ECF
18 244, filed on January 8, 2018. On these second amended bankruptcy schedules, Debtor
19 again did not claim a homestead exemption in the Hawaiian Avenue property pursuant to
20 the regular California nonbankruptcy set of exemptions of C.C.P. § 704 as he only chose
21 the alternative set of bankruptcy-like exemptions of C.C.P. § 703.140(b) in personal
22 property assets in the amount of \$37,900, including the Commissions. *Id.* at 8-9.

23 On February 10, 2016, Trustee filed his reply to this opposition and acknowledged
24 Debtor's right to exempt some Commissions, but objected to any amount in excess of the
25 allowed exemption amount of \$20,200 pursuant to C.C.P. § 703.140(b)(5). *Reply to the*
26 *Debtor's Response to the Trustee's Request for Injunctive Relief*, Adversary Proceeding
27 ECF 16, filed on February 10, 2016, *Trustee's Request for Judicial Notice, Exhibit 6*, ECF
28 244, filed on January 8, 2018.

1 On February 11, 2016, Trustee filed his motion objecting to Debtor's claimed
2 exemption for certain property assets, specifically, the exemptions claimed by Debtor in
3 the assets of Long Beach Realty, Inc., pursuant to C.C.P. §§ 703.140(b)(5) and (b)(6) in
4 Debtor's second amended bankruptcy schedules filed on February 4, 2016. *Motion by*
5 *the Chapter 7 Trustee Objecting to the Debtor's Claimed Exemption for Certain Personal*
6 *Property Assets; Memorandum of Points and Authorities; Declaration of Brett B. Curlee in*
7 *Support Thereof*, ECF 48, filed on February 11, 2016, *Trustee's Request for Judicial*
8 *Notice, Exhibit 9*, filed on January 8, 2018. In this motion, Trustee argued that Debtor's
9 exemption under C.C.P. § 703.140(b)(6) is limited to \$400.00 for business equipment in
10 Long Beach Realty, Inc.; that Debtor's exemption under C.C.P. § 703.140(b)(5) is limited
11 to \$20,200.00 in real estate sales commissions valued at \$44,303.00, of which \$28,700
12 was claimed by Debtor as exempt on his second amended schedules; and that the
13 balance of the real estate sales commissions of \$24,103.00 should be administered by
14 Trustee for the benefit of the bankruptcy estate. *Id.* at 6.

15 On February 17, 2016, the court conducted an evidentiary hearing on Trustee's
16 Motion for Preliminary Injunction and Turnover in the Adversary Proceeding. *Transcript*
17 *of Hearing re: Motion by the Plaintiff and Chapter 7 Trustee for Turnover of Funds,*
18 *Accounting, Temporary Restraining Order, and Preliminary Injunction against the*
19 *Defendant Pending Noticed Hearing on Preliminary Injunction and Disposition of*
20 *Litigation, Trustee's Request for Judicial Notice, Exhibit 8*, ECF 244, filed on January 8,
21 2018. At this hearing, the parties, Trustee and Debtor, stated their agreement on the
22 merits of the turnover motion on the record that out of the \$44,804 in Commissions listed
23 on Debtor's amended bankruptcy schedules, \$16,054 was not exempt and should be
24 turned over to Trustee, but that the parties disputed whether Debtor could claim the
25 remaining amount of \$8,550 in Long Beach Realty's bank account under a "tool of the
26 trade" exemption pursuant to C.C.P. § 703.140(b)(6), and based on this agreement, on
27 February 19, 2016, the court entered an order granting the preliminary injunction motion
28 in part and denying it in part, which required Debtor to turn over \$16,054 to Trustee and

1 to turn over to his counsel, Mr. Altman, the remaining disputed amount of \$8,550 to hold
2 pending further order of the court on Debtor's claim of exemption as to those funds. *Id.*
3 *Order on Motion by the Plaintiff and Chapter 7 Trustee for Turnover of Brokerage*
4 *Commissions and for Preliminary Injunction Pending Disposition of Litigation*, Adversary
5 Proceeding ECF 20, filed on February 19, 2016, *Trustee's Request for Judicial Notice*,
6 *Exhibit 7*, ECF 244, filed on January 8, 2018.

7 On February 23, 2016, Debtor filed his opposition to Trustee's motion objecting to
8 Debtor's claimed exemption in certain personal property assets. *Opposition to the*
9 *Trustee's Motion Objecting to the Debtor's Exemption in Personal Property*, ECF 57, filed
10 on February 23, 2016, *Trustee's Request for Judicial Notice, Exhibit 10*, ECF 244, filed
11 on January 8, 2018. In his opposition to Trustee's motion objecting to the claimed
12 exemption in certain personal property assets, Debtor argued that he "has a right to claim
13 the exemption [for tools of the trade] under C.C.[P.] 703.140(b)(6)" in "business cash
14 assets" in the amount of \$7,625.00 and that "Debtor's election of this exemption is
15 permissible under case law." *Id.* at 4. Debtor further argued that he "should be given the
16 benefit of the doubt in any question whether an exemption is legitimately chosen" and
17 that "[u]nless the Debtor chooses an exemption to which the Debtor blatantly has no right
18 to claim, where the Debtor has lawfully elected an exemption, and has not exceeded the
19 limits of that exemption amount, the exemption should stand absent evidence to the
20 contrary." *Id.* at 5 (citations omitted). Debtor further noted that the actual value of his
21 business, Long Beach Realty, should have been \$45,082.62 and that he had a
22 "remaining claimed wildcard" exemption of \$20,920.38 in his Long Beach Realty assets.
23 *Id.* at 6. It appears that Debtor meant to argue that the court should overrule Debtor's
24 claimed exemption of \$21,125 on his second amended schedules pursuant to C.C.P.
25 § 703.140(b)(5) in addition to his "tools of the trade" exemption of \$7,625 pursuant to
26 C.C.P. § 703.140(b)(6). *Summary of Amended Schedules, Master Mailing List, and/or*
27 *Statements [LBR 1007-1(c)], Schedule C-Property Claimed as Exempt*, ECF 45 at 8,
28 *Trustee's Request for Judicial Notice, Exhibit 5*, ECF 244, filed on January 8, 2018. That

1 is, Debtor in his opposition did not concede the objection as to the claimed exemption
2 under C.C.P. § 703.140(b)(5) as Debtor further argued in conclusion that the court should
3 overrule Trustee's objection. *Id.* at 6.

4 On February 24, 2016, Trustee conducted a second meeting of creditors in this
5 case pursuant to 11 U.S.C. § 341(a). Debtor appeared, was questioned and gave
6 testimony, *Avery Motion Declaration*, ECF 96 at 20 (document page 19), ¶ 18, *Trustee's*
7 *Request for Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit Z1, Trustee's Trial*
8 *Exhibit 126*. According to Trustee, at this meeting of creditors, Debtor advised that he
9 had received all of the Commissions, including receivables for the "W. L. Street Sale" for
10 \$9,500.00, the "Banning Sale" for \$20,178.00 and the "Oceanside Sale" for \$14,625.00,
11 and Debtor further testified that after turning over, pursuant to the court's turnover order,
12 the \$16,054.00 in non-exempt Commissions to Trustee and depositing the \$8,500.00 with
13 his attorney the amount to be determined in the litigation of his exemption claim under the
14 California bankruptcy-like set of exemptions of C.C.P. § 703.140(b), he had spent the
15 remaining amount of \$20,200.00 that he had claimed as exempt under C.C.P.
16 § 703.140(b) and that the parties had so agreed in that litigation. *Avery Motion*
17 *Declaration*, ECF 96 at 20-21 (document pages 19-20), ¶¶ 18-19, *Trustee's Request for*
18 *Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit Z1, Trustee's Trial Exhibit 126*.
19 This testimony of Trustee recounting the proceedings at the second meeting of creditors
20 is not disputed by Debtor and is otherwise credible.

21 At the hearing on March 8, 2016 on Trustee's motion objecting to Debtor's
22 exemption in certain personal property assets (i.e., cash and commissions of Long Beach
23 Realty) under CCP § 703.140(b)(5) and (6) in the main bankruptcy case, counsel for the
24 parties, Trustee and Debtor, based on the hearing on February 17, 2016 in the related
25 adversary proceeding, stated their agreement on the merits of the turnover motion on the
26 record that out of the \$44,804 in Commissions listed on Debtor's amended bankruptcy
27 schedules, \$16,054 was not exempt and had to be turned over to Trustee, \$20,200 was
28 exempt and the only dispute between the parties was whether Debtor could claim the

1 remaining amount of \$8,550 in cash of Long Beach Realty under a “tool of the trade”
2 exemption pursuant to C.C.P. § 703.140(b)(6). *Transcript of Hearing re: Motion by the*
3 *Chapter 7 Trustee Objecting to the Debtor’s Claimed Exemption for Certain Personal*
4 *Property Assets, March 8, 2016, Trustee’s Request for Judicial Notice, Exhibit 11, ECF*
5 244, filed on January 8, 2018. At the hearing on Trustee’s motion objecting to Debtor’s
6 exemption in certain personal property assets on March 8, 2016, the parties also stated
7 their agreement that there were no disputed facts or genuine issues of material fact for
8 trial on Trustee’s motion objecting to Debtor’s exemption in certain personal property
9 assets. *Id.* Based on Debtor’s request that the court issue findings of fact and
10 conclusions of law, the court then requested the parties to lodge proposed findings of fact
11 and conclusions of law and afterwards took the matter of Trustee’s Objection to Debtor’s
12 Exemption in the Commissions under submission. *Id.*

13 On March 9, 2016, Trustee filed an application to employ a real estate broker to
14 sell the Hawaiian Avenue property. *Application to Employ Aaron Juarez, as the Chapter*
15 *7 Trustee’s Real Estate Agent as of 2/23/2016 to Sell the Real Property Commonly*
16 *Known as 329 Hawaiian Avenue, Wilmington, CA 90744, and Notice of Motion, ECF 61*
17 *and 62, Trustee’s Request for Judicial Notice, Exhibit 15, ECF 244, filed on January 8,*
18 2018. In this application, Trustee represented that there was “no less than \$67,339.03 in
19 equity in the Property that [could] be used to benefit the bankruptcy estate after paying
20 secured claims, real estate commissions, and sale costs.” *Id.* at ¶ 6. Trustee served this
21 application to employ the real estate broker on Debtor, who did not object to the
22 application. *Id.* On June 1, 2016, the court filed and entered an order approving the
23 application. ECF 93, filed and entered on June 1, 2016.

24 On May 9, 2016, Debtor filed further amended his bankruptcy schedules, including
25 his Schedule A-Real Property, Schedule B-Personal Property, Schedule C-Property
26 Claimed as Exempt, and Schedule D-Creditors Holding Secured Claims. *Summary of*
27 *Amended Schedules, Master Mailing List, and/or Statements [LBR 1007-1(c)], ECF 85*
28 *and 85-1, Trustee’s Request for Judicial Notice, Exhibit 16, ECF 244, filed on January 8,*

1 2018. Debtor in his further amended Schedule A-Real Property listed the value of the
2 Hawaiian Avenue property at \$320,000 with the amount of secured claims of
3 \$287,766.98, and in his further amended Schedule C-Property Claimed as Exempt, he
4 claimed a homestead exemption of \$75,000 pursuant to the regular California
5 nonbankruptcy exemptions of C.C.P. § 704.730. *Summary of Amended Schedules,*
6 *Master Mailing List, and/or Statements [LBR 1007-1(c)], Amended Schedule A-Real*
7 *Property and Amended Schedule C-Property Claimed as Exempt*, ECF 85-1 at 1 and 7,
8 *Trustee's Request for Judicial Notice, Exhibit 16*, ECF 244, filed on January 8, 2018.
9 Additionally, Debtor asserted a \$7,625 "tool of the trade" exemption in the Commissions
10 valued at \$44,303, but under the regular California nonbankruptcy exemption of C.C.P.
11 § 704.060(a)(1), rather than under the alternate bankruptcy-like exemption of C.C.P.
12 § 703.140(b)(6) as claimed in Schedule C of his prior bankruptcy schedules. *Id.*, ECF 85-
13 1 at 7. However, Debtor did not claim any exemption for the Commissions. *Id.* In this
14 further amended Schedule C, Debtor claimed total exemptions under the regular
15 California nonbankruptcy exemptions of C.C.P. § 704 in the amount of \$85,975, including
16 \$75,000 as a homestead exemption in the Hawaiian Avenue property. *Id.*, ECF 85-1 at
17 7-8.

18 According to Debtor, he and his counsel, Mr. Altman, "talked about changing
19 exemptions in or around April 2016" and "[t]he purpose of discussing the changing of the
20 exemptions was related to our legal position regarding proposing a viable Chapter 13
21 case." *Trial Declaration of Arturo Gonzalez*, ECF 131 at 3, ¶¶ 14-15, filed on July 22,
22 2016, *Debtor's Exhibit A*.

23 As previously noted, on June 8, 2016, Trustee filed his Motion objecting to
24 Debtor's further amended exemptions on the amended schedules filed on May 9, 2016,
25 including the exemptions claimed in the Hawaiian Avenue property and the Commissions
26 pursuant to the regular California nonbankruptcy exemptions of C.C.P. § 704. *Motion*,
27 ECF 96, *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit*
28 *Z1, Trustee's Trial Exhibit 126*.

1 Debtor filed his written opposition to the Motion on June 24, 2016, ECF 113, and
2 Trustee filed a reply thereto on June 30, 2016, ECF 115. The court held an initial hearing
3 on the Motion on July 7, 2016, where the court continued the matter in order for Debtor
4 and Trustee to consider whether an evidentiary hearing was necessary. At the continued
5 hearing on July 15, 2016, Debtor argued that an evidentiary hearing was necessary in
6 order to present evidence regarding Debtor's intent, and the court agreed and scheduled
7 the evidentiary hearing to take testimony and receive other evidence.

8 On June 16, 2016, Trustee filed a motion to sell the Hawaiian Avenue property.
9 *Motion by the Chapter 7 Trustee for Order Approving (1) Real Property Sale . . . (2)*
10 *Overbid Procedure; (3) Real Estate Agent Compensation, Trustee's Trial Exhibit 128,*
11 ECF 100. At the hearing on the sale motion on July 19, 2016, the court approved the
12 sale of the Hawaiian Avenue property with a sales price of \$367,000.00, yielding
13 approximately \$74,532.86 in net equity to the estate after paying off the existing liens and
14 costs of sale. *Order after Hearing on Motion by Chapter 7 Trustee to Approve: (1) Real*
15 *Property Sale (329 Hawaiian Avenue, Wilmington, CA 90744) Free and Clear of Liens*
16 *and Interests; (2) Overbid Procedure; Real Estate Agent Compensation; (4) Directing*
17 *Turnover of Real Property; and (5) Distribution of Sale Proceeds, ECF 135, filed and*
18 entered on July 29, 2016. This order provided that Trustee was authorized to pay the
19 broker's six percent commission directly from escrow, but that Trustee was not to pay any
20 homestead exemption or tax liens pending the resolution of this Motion. *Id.* at ¶¶ 10-11.

21 On July 12, 2016, the court filed and entered its order granting in part and denying
22 in part Trustee's motion objecting to Debtor's claimed exemption in certain personal
23 property assets, namely, the Commissions, with accompanying findings of fact and
24 conclusions of law. *Order on Chapter 7 Trustee's Motion Objecting to the Debtor's*
25 *Claimed Exemption in Certain Personal Property Assets, ECF 118; Findings of Fact and*
26 *Conclusions of Law re: Motion by the Chapter 7 Trustee Objecting to the Debtor's*
27 *Claimed Exemption for Certain Personal Property Assets, ECF 119.* In its order, the
28 court held that "[b]ased on the agreement of the parties, Debtor's claimed personal

1 property asset exemption under the California bankruptcy-like set of exemptions of
2 C.C.P. § 703.140(b) claimed in Debtor's second amended schedules, ECF 45, was
3 allowed in part and disallowed in part, that is, the exemption was allowed only in the
4 previously agreed and allowed exempt amount of \$20,200, and the court ordered Debtor
5 to turn over the disputed amount of \$8,550 from the Commissions that was being held by
6 Debtor's counsel pending further order of the court. *Id.* The court held that the
7 Commissions, although arguably working capital, could not be considered a "tool of the
8 trade" pursuant to C.C.P. § 703.140(b)(6). *Id.* Debtor did not appeal the court's final
9 order allowing in part and disallowing in part his claimed exemptions in the Commissions
10 under the bankruptcy-like set of exemptions of C.C.P. § 703.140(b), which was entered
11 pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7054 and Federal Rule of
12 Civil Procedure 54, making the order a final non-appealable order.

13 According to Trustee, as of July 29, 2016, administrative claims against the
14 bankruptcy estate in this case for professional fees total \$131,760.19, including
15 \$63,186.76 owed to Trustee's counsel, Mr. Curlee, \$26,973.20 owed to Trustee's
16 accountant, Menchaca & Company, LLP, \$22,020.00 owed to the real estate agent and
17 the buyer's real estate agent pursuant to the motion to sell real property and the order
18 entered thereon, and \$19,580.20 owed to the Trustee, if approved by the court under 11
19 U.S.C. § 326.. *Trustee's Reply to the Trial Declaration of Arturo Gonzalez in Support of*
20 *His Opposition to the Trustee's Objection to the Debtor's Exemption Filed as Docket*
21 *#113, Supplemental Declaration of Wesley H. Avery*, ECF 133, filed on July 29, 2016 at
22 12-13, ¶¶ 7-8. The Trustee testified that these administrative expenses were incurred
23 "[a]s a result of the heavy litigation regarding Debtor's claimed exemptions in the
24 Commissions, [Debtor's opposition] to the motion to sell [the Hawaiian Avenue property],"
25 and in the contested matter of Trustee's motion objecting to Debtor's claimed homestead
26 exemption and in other proceedings. *Id.* There is an unsecured nonpriority claim against
27 the bankruptcy estate for \$10,345.75, for \$142,105.94 in total administrative expenses
28 and nonpriority unsecured claims. *Id.* "The Estate will be substantially prejudiced by

1 reducing the funds available to pay creditors from \$99,136.86 (before the offset is taken
2 into account against the IRS secured claim, Claim No. 3-1 in the Claims Register for
3 \$32,926.98 under 11 U.S.C. § 507(a)(1)-(7) and 11 U.S.C. §§ 724(b)(2) [*In re Bankruptcy*
4 *Estate of Mark Air, Inc.*, 308 F.3d 1057, 1061-1062 (9th Cir. 2002)]) to only \$44,804.00
5 thereby eliminating the Estate's ability to pay even a substantial portion of the
6 administrative claims in full." *Id.* at ¶ 8. Also attached to this reply, were the Declarations
7 of John Menchaca and Brett Curlee also confirming the amounts of these expenses.

8 II. DISCUSSION

9 As discussed below, the court holds that the California state law doctrine of
10 equitable estoppel under the facts of this case bars Debtor from changing his election
11 from exemptions under the California bankruptcy-like exemptions of C.C.P. § 703.140(b)
12 to exemptions under the alternate regular California nonbankruptcy set of exemptions of
13 C.C.P. §§ 704.730, 704.020, and 704.060(a)(1). For the following reasons, the court
14 grants Trustee's Motion Objecting to Debtor's Homestead Exemption and disallows
15 Debtor's claimed homestead exemption.

16 A. California State Law Exemptions

17 California is an "opt-out" state, meaning that a debtor may only claim exemptions
18 allowed under California law. C.C.P. § 703.140(a) and (b); C.C.P. § 704.010 *et seq.*; see
19 *also In re Applebaum*, 422 B.R. 684, 688 (9th Cir. BAP 2009). "California debtors may
20 choose between two sets of state law exemptions, the regular nonbankruptcy exemptions
21 (Calif. C.C.P. § 704.010 *seq.*) or the bankruptcy-like set of exemptions (Calif. C.C.P.
22 § 703.140(b)). They may *not* use the exemptions contained in the Bankruptcy Code (11
23 USC § 522)." 1 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy*,
24 ¶ 2:601 at 2-84 (2018) (emphasis in original) (citing 11 U.S.C. § 522); see *also* 11 U.S.C.
25 § 522(b)(1); C.C.P. § 703.140(a) and (b); *Flinn v. Morris (In re Steward)*, 227 B.R. 895,
26 898 (9th Cir. BAP 1998). "[W]hen a debtor claims a *state-created* exemption, the
27 exemption's scope is determined by state law, which may provide that certain types of
28

1 debtor misconduct warrant denial of the exemption.” *Law v. Siegel*, 571 U.S. 415, 134 S.
2 Ct. 1188, 1196-1197 (2014) (emphasis in original).

3 In this case, Debtor claimed exemptions under the California bankruptcy-like set of
4 exemptions of C.C.P. § 703.140(b) in his initial Schedule C-Property Claimed as Exempt
5 filed on October 5, 2015, and in his next two amended Schedule Cs filed on December
6 15, 2015 and February 4, 2016. It was not until after Debtor litigated to trial the matter of
7 Trustee’s objection to his claim of exemption in the Commissions pursuant to C.C.P.
8 § 703.140(b)(6), for which there is now a final non-appealable order deciding that Debtor
9 was not entitled to the “tool of the trade” exemption under that provision, that he
10 amended and filed a further amended Schedule C-Property Claimed as Exempt on May
11 9, 2016 claiming instead different exemptions, including a homestead exemption under
12 the regular California nonbankruptcy exemption of C.C.P. § 704.730. Thus, Debtor
13 consistently took the position, as reflected in his bankruptcy schedules and in litigation
14 proceedings before this court, that he was claiming exemptions only in personal property
15 assets, namely, the real estate sales commissions, pursuant to the California bankruptcy-
16 like set of exemptions of C.C.P. § 703.140(b) for approximately eight months before he
17 amended his schedules to choose different exemptions under the regular California
18 nonbankruptcy exemptions of C.C.P. § 704, including a homestead exemption for the first
19 time. Furthermore, Debtor increased his total amount of claimed exemptions by \$48,075
20 from his second amended Schedule C-Property Claimed as Exempt to his third amended
21 Schedule C-Property Claimed as Exempt.

22 Debtor argues that he “has a right to amend his exemptions from one exemption
23 scheme to the other as long as the case remains open.” *Debtor’s Brief per Court Order*
24 #145, ECF 156 at 5, filed on November 4, 2016. Federal Rule of Bankruptcy Procedure
25 1009 provides that debtors may amend their bankruptcy schedules “as a matter of course
26 at any time before the case is closed.” “But amending Schedule C to *claim* an exemption
27 is separate from the question whether the exemption is *allowable*; creditors and parties in
28 interest may object to exemptions added by amendment.” 2 March, Ahart and Shapiro,

1 *California Practice Guide: Bankruptcy*, ¶ 7:223 at 7-28 (emphasis in original) (referring
2 readers to ¶ 7:255, *infra*, which cites to Federal Rule of Bankruptcy Procedure
3 4003(b)(1)). While Debtor may amend his bankruptcy schedules, simply amending the
4 schedules does not necessarily mean that the amendments are allowable. *Id.* Rule
5 4003(b)(3) explicitly recognizes that creditors may file an objection to the list of property
6 claimed as exempt within 30 days after any amendment. *Id.*; see also *In re Bernard*, 40
7 F.3d 1028, 1030-1032 (9th Cir. 1994).

8 Debtor argues that although there is a final non-appealable order determining
9 Debtor's claims of exemptions under the California bankruptcy-like set of exemptions of
10 C.C.P. § 703.140(b), "[n]o issues were reviewed or resolved concerning the Debtor's
11 future ability to amend his exemptions, or whether he could or could not exempt value in
12 his House." *Debtor's Brief per Court Order*, ECF 156 at 9, filed and entered on
13 November 4, 2016. This argument misses the point of equitable estoppel. Debtor
14 repeatedly asserted his exemption rights under the California bankruptcy-like set of
15 exemptions of C.C.P. § 703.140(b) over an eight-month period of time, inducing Trustee
16 in reliance to incur administrative expenses to litigate Debtor's claimed exemptions in
17 personal property assets pursuant to C.C.P. § 703.140(b) and to sell the Hawaiian
18 Avenue property to realize the value of the net equity for the benefit of the estate's
19 creditors based on Debtor's litigated selection of these exemptions under that provision.
20 It is unreasonable for Debtor to have claimed the California bankruptcy-like set of
21 exemptions under C.C.P. § 703.140(b), inducing Trustee to have litigated in contested
22 evidentiary proceedings this claimed set of exemptions, only to have Debtor switch his
23 claim of exemptions after not getting the result he wanted in this litigation of his C.C.P.
24 § 703.140(b) bankruptcy-like exemption claims and then claiming a different set of
25 exemptions under the regular California nonbankruptcy set of exemptions of C.C.P.
26 § 704.

27 Trustee would not have had to incur considerable administrative expense in
28 litigating Debtor's exemption claims under the California bankruptcy-like set of

1 exemptions of C.C.P. § 703.140(b) if Debtor had chosen to claim the regular California
2 nonbankruptcy set of exemptions of C.C.P. 704 in the first instance. Trustee would not
3 have sold the Hawaiian Avenue property if Debtor had claimed a homestead exemption
4 under C.C.P. § 704 because there would have been no realizable net equity for the
5 estate to pay creditors accounting for Debtor's homestead exemption. Because Debtor
6 had not claimed any homestead exemption under his various amended bankruptcy
7 schedules at the time that Trustee filed the application to employ the real estate broker
8 and the motion to sell the Hawaiian Avenue property, Trustee believed that the sale
9 would bring in net sales proceeds of around \$67,000 to pay creditors, which is \$8,000
10 less than Debtor's \$75,000 homestead exemption. *See, Declaration of Aaron Juarez,*
11 *ECF 61 at ¶ 6, filed on March 9, 2016, Trustee's Trial Exhibit 17.* The evidence shows
12 that at the meeting of creditors on December 15, 2015, Trustee told Debtor that he could
13 either keep through exemptions the Commissions or the Hawaiian Avenue property, but
14 not both, and Debtor consciously and conspicuously chose the former, the Commissions,
15 as indicated by Trustee's testimony regarding the first meeting of creditors and Debtor's
16 pleadings opposing Trustee's turnover motion for the Commissions in the adversary
17 proceeding and Trustee's motion objecting to Debtor's claimed exemptions pursuant to
18 C.C.P. §703.140(b) on his February 4, 2016 amended schedules and Debtor's continued
19 possession of the Commissions of \$20,200 he previously claimed as exempt under
20 C.C.P. § 703.140(b), which exceeds the amount of \$7,625 of the Commissions which he
21 now claims as exempt under C.C.P. § 704.060(a)(1).

22 **B. Equitable Estoppel**

23 Under California law, five elements must be present for the doctrine of equitable
24 estoppel to apply:

- 25 (a) a representation or concealment of material facts;
- 26 (b) made with knowledge, actual or virtual, of the facts;
- 27 (c) to a party ignorant, actually and permissibly, of the truth;
- 28 (d) with the intention, actual or virtual, that the ignorant party act on it; and
- (e) that party was induced to act on it.

1 *Simmons v. Ghaderi*, 44 Cal.4th 570, 584 (2008) (citing 13 Witkin, *Summary of California*
2 *Law, Equity*, § 191 at 527-528 (10th ed. 2005)); accord *In re Lua*, 692 Fed. Appx. 851,
3 852 (9th Cir. 2017) (citing *Behnke v. State Farm General Insurance Co.*, 196 Cal.App.4th
4 1443, 1462 (2011)). “Estoppel will not be found unless all elements are satisfied.” *In re*
5 *Lua*, 692 Fed. Appx. at 852 (citing *Moore v. State Board of Control*, 112 Cal.App.4th 371,
6 384 (2003)). As the party asserting equitable estoppel, Trustee has the burden of proof.
7 *Busching v. Superior Court*, 12 Cal.3d 44, 53 (1974) (“Unless the record affirmatively
8 discloses the existence of a sufficient excuse or the basis of an estoppel, the burden
9 rests on plaintiff to prove it.”) (citations omitted). The court finds that Trustee has met the
10 burden of proof by a preponderance of the evidence that equitable estoppel applies to
11 this case.

12 **1. Representation or Concealment of Material Fact**

13 The party against whom equitable estoppel is sought must have represented or
14 concealed a material fact. *Simmons v. Ghaderi*, 44 Cal.4th at 584; see also *In re Lua*,
15 692 Fed. Appx. at 852 (citing *Behnke v. State Farm General Insurance Co.*, 196
16 Cal.App.4th at 1462). For this purpose, the court finds that Debtor’s bankruptcy
17 schedules filed on October 5, 2015, December 14, 2015, and February 4, 2016 claiming
18 the California bankruptcy-like exemptions of C.C.P. § 703.140(b), were representations of
19 material fact made by him that he selected this set of exemptions rather than the
20 alternate set of regular California nonbankruptcy exemptions of C.C.P. § 704. The court
21 finds that in addition to the representations by Debtor in these bankruptcy schedules to
22 the court, Trustee, and creditors (that he had elected personal property exemptions
23 pursuant to the bankruptcy-like exemptions of C.C.P. § 703.140(b)), Debtor also made
24 specific representations to Trustee in the form of statements made under oath directly
25 from Debtor to Trustee at the meeting of creditors, which constitute representations to
26 Trustee for equitable estoppel purposes. For example, at Debtor’s December 15, 2015
27 meeting of creditors, Debtor testified that there were no errors or omissions in his
28 schedules. Having acknowledged that he had filed the first amended schedules one day

1 earlier, which claimed only personal property exemptions under the California
2 bankruptcy-like set of exemptions of C.C.P. § 703.140(b), Debtor represented to Trustee
3 that his intentions were truly and accurately reflected in the first amended schedules to
4 elect personal property exemptions pursuant to C.C.P. § 703.140(b). In seeking court
5 approval of the employment applications of counsel and a real estate broker in January
6 and March 2016, Trustee also communicated to Debtor that if Debtor claimed exemptions
7 in the Commissions rather than a homestead exemption, Trustee intended to liquidate
8 the real property for the benefit of the bankruptcy estate and creditors.

9 Similarly, at the meeting of creditors held on February 24, 2016, Debtor made
10 additional representations to Trustee when Debtor testified that he had received all of the
11 Commissions and spent the remaining \$20,200 that he had claimed as exempt under the
12 California bankruptcy-like set of exemptions of C.C.P. § 703.140(b). The fact that Debtor
13 told Trustee that his schedules claiming the bankruptcy-like exemptions of C.C.P. §
14 703.140(b) were still true and accurate in addition to the fact that Debtor spent the money
15 he claimed as exempt, represented to the Trustee that Debtor was satisfied with his
16 election of exemptions and had no intention of switching his election from personal
17 property exemptions under the bankruptcy-like exemptions of C.C.P. § 703.140(b) to the
18 other statutory set of regular California nonbankruptcy exemptions under C.C.P. § 704.
19 Thus, Debtor's representations at the meetings of creditors on December 15, 2015 and
20 February 24, 2016 represented to Trustee that Debtor was only electing personal
21 property exemptions pursuant to C.C.P. § 703.140(b) and no homestead exemption in
22 the Hawaiian Avenue property pursuant to C.C.P. § 704.

23 The court also finds that Debtor's representations made in his written pleadings
24 and oral arguments in litigation proceedings in this case constitute representations to the
25 Trustee for equitable estoppel purposes. As stated previously, on February 3, 2016,
26 Debtor filed his opposition to Trustee's motion for preliminary injunctive relief for turnover
27 of the sales commissions in the adversary proceeding, stating that he would turn over
28 nonexempt funds described as "real estate commissions" less those amounts retained as

1 an exemption pursuant to the Debtor's amended schedules to be filed the next day on
2 February 4, 2016, which claimed exemption in the commissions under C.C.P.
3 § 703.140(b), not C.C.P. § 704, and requesting the court to rule on whether Debtor needs
4 to turn over any remaining funds that he still claims as exempt pending resolution of the
5 adversary proceeding. *Response to the Trustee's Request for Injunctive Relief*,
6 Adversary Proceeding ECF 14, filed on February 3, 2016 at 2, *Trustee's Request for*
7 *Judicial Notice, Exhibit 4*, ECF 244, filed on January 8, 2018. In other words, Debtor
8 represented to Trustee in this pleading that he made his choice to claim exemptions of
9 his personal property assets (the sales commissions) pursuant to C.C.P. § 703.140(b)
10 and was defending such choice in opposing Trustee's motion for preliminary injunction for
11 turnover. Debtor further represented to Trustee in this pleading that he was retaining the
12 sales commission in his possession that he claimed as exempt under C.C.P.

13 § 703.140(b) and that he was asking the court whether he had to turn over the funds that
14 he was so claiming as exempt to Trustee pending litigation of the adversary proceeding.

15 Also, as previously noted, on February 23, 2016, Debtor filed his Opposition to the
16 Trustee's Motion Objecting to the Debtor's Exemption in Personal Property, expressly
17 arguing that Trustee's objection to Debtor's claimed exemptions to the Long Beach
18 Realty assets of \$7,625 pursuant to C.C.P. § 703.140(b)(6) and of \$21,125.00 pursuant
19 to C.C.P. § 703.140(b)(5) on the second amended schedules should be overruled.

20 *Opposition to the Trustee's Motion Objecting to the Debtor's Exemption in Personal*
21 *Property*, ECF 57, filed and entered on February 23, 2016, *Trustee's Trial Exhibit 121*, at
22 3-4. Specifically, Debtor argued that it was his right to claim the business cash assets of
23 Long Beach Realty of \$7,625.00 as a "tool of the trade" pursuant to C.C.P.

24 § 703.140(b)(6) and that he "should be given the benefit of the doubt in any question as
25 to whether an exemption is legitimately chosen." *Id.* at 5. Debtor further argued that
26 Trustee's objection to his claimed personal property asset exemptions in Long Beach
27 Realty should be overruled, which include his claimed exemption under C.C.P.

28 § 703.140(b)(5). In other words, Debtor represented in this pleading to Trustee that he

1 made a choice of his claimed exemptions in his personal property assets of Long Beach
2 Realty pursuant to the California bankruptcy-like exemptions of C.C.P. § 703.140(b) on
3 the second amended schedules and was defending that choice in opposing Trustee's
4 motion objecting to these exemption claims.

5 As also previously noted, on March 8, 2016, the court held a hearing on Trustee's
6 motion objecting to Debtor's claimed exemptions in the Long Beach Realty personal
7 property assets wherein counsel for the parties, Trustee and Debtor, stated that the
8 parties agreed that \$16,054 was not exempt and had to be turned over to Trustee,
9 \$20,200 was exempt as claimed by Debtor, the only dispute between the parties was
10 whether Debtor could claim the remaining amount of \$8,550 in cash of Long Beach
11 Realty under a "tool of the trade" exemption pursuant to C.C.P. § 703.140(b)(6), and the
12 parties agreed that the court could decide this remaining unresolved claim of exemption
13 of Debtor without further evidentiary hearing. *Transcript of Hearing re: Motion by the*
14 *Chapter 7 Trustee Objecting to the Debtor's Claimed Exemption for Certain Personal*
15 *Property Assets, March 8, 2016, Trustee's Request for Judicial Notice, Exhibit 11, ECF*
16 *244, filed on January 8, 2018. In other words, at this hearing, Debtor was still*
17 *representing to Trustee that he was still choosing and litigating his claimed exemptions in*
18 *his personal property assets of Long Beach Realty pursuant to the California bankruptcy-*
19 *like set of exemptions of C.C.P. § 703.140(b) on the second amended schedules by*
20 *continuing his opposition to Trustee's motion objecting to these exemption claims and*
21 *allowing the court to take the matter under submission because he was still pressing his*
22 *choice of the personal property exemptions under C.C.P. § 703.140(b).*

23 As previously noted, on February 24, 2016, Trustee conducted a second meeting
24 of creditors in this case pursuant to 11 U.S.C. § 341(a) wherein Debtor appeared, was
25 questioned and gave testimony, stating that he received all of the prepetition sales
26 commissions for Long Beach Realty, that after turning over the \$16,054 in nonexempt
27 commissions to Trustee as agreed by the parties and ordered by the court and depositing
28 the \$8,550 claimed as exempt under the tools of the trade exemption pursuant to C.C.P.

1 § 703.140(b)(6), he had spent the remaining \$20,200.00 which he had claimed as
2 exempt under C.C.P. § 703.140(b)(5), which based on the agreement of the parties he
3 was not required to turn over to Trustee. *Avery Motion Declaration*, ECF 96 at 20-21
4 (document page 19-20), ¶¶ 18-19, Trustee's Request for Judicial Notice, ECF 111, filed
5 on June 20, 2016, Exhibit Z1, *Trustee's Trial Exhibit 126*.

6 It was not until May 9, 2016, that Debtor filed his further amended Schedule C-
7 Property Claimed as Exempt claiming exemptions under the alternate regular California
8 nonbankruptcy set of exemptions of C.C.P. §§ 704.730 and 704.060(a)(1). Thus, until
9 this date, Debtor's representations to Trustee as reflected in the proceedings in this case,
10 including Debtor's bankruptcy petition and schedules as amended twice on December
11 15, 2015 and February 4, 2016, Debtor's statements at the meetings of creditors on
12 December 15, 2015 and February 24, 2016 and in Debtor's pleadings in opposition to
13 Trustee's motions for turnover in the adversary proceeding and objecting to Debtor's
14 claimed exemptions of C.C.P. § 703.140(b) on the second amended schedules
15 represented to Trustee that Debtor's choice was to claim personal property exemptions
16 pursuant to C.C.P. § 703.140(b), rather than a homestead exemption in his real property
17 pursuant to C.C.P. § 704.

18 The court finds that Debtor's representations that he was choosing and litigating
19 his right to claim exemptions in the personal property assets pursuant to the California
20 bankruptcy-like exemptions of C.C.P. § 703.140(b), rather than the regular California
21 nonbankruptcy exemptions of C.C.P. § 704 exemptions, were material. First, Trustee
22 incurred administrative expenses of \$131,760.19 in reliance on Debtor's repeated
23 representations during this case in his schedules, his pleadings, and at meetings of
24 creditors and hearings that he was entitled to C.C.P. § 703.140(b) personal property
25 exemptions. *Supplemental Declaration of Wesley H. Avery* attached as exhibit to
26 *Trustee's Reply to the Trial Declaration of Arturo Gonzalez in Support of His Opposition*
27 *to the Trustee's Objection to the Debtor's Exemption Filed as Docket # 113*, ECF 133,
28 filed on July 29, 2016, at 12-13 ¶¶ 7-8. These administrative expenses consist of

1 Trustee's costs of litigation in attorneys' fees incurred by him and the bankruptcy estate
2 objecting to Debtor's election of personal property exemptions in excess of the allowable
3 amount under C.C.P. § 703.140(b), the Adversary Proceeding commenced to recover the
4 Commissions that Debtor received and claimed as exempt pursuant to C.C.P.
5 § 703.140(b), and for the sale of the Hawaiian Avenue property.

6 Second, there is a final non-appealable order from this court holding that Debtor
7 was entitled to claim C.C.P. § 703.140(b) personal property exemptions. Although the
8 court entered its decision and order after Debtor filed his third amended schedules to
9 change Debtor's election from the bankruptcy-like exemptions of C.C.P. § 703.140(b) to
10 alternate regular nonbankruptcy exemptions of C.C.P. § 704, the court made specific
11 findings of fact supporting the order which Debtor did not appeal. As previously
12 mentioned, the court determined in its decision and order that Debtor was entitled to
13 exemptions of \$400 under C.C.P. § 703.140(b)(6) for Long Beach Realty's business
14 equipment, and \$20,200 under C.C.P. § 703.140(b)(5) in Commissions. In its order, the
15 court required Debtor to turn over to the Trustee \$8,550 in disputed sales commissions
16 that the attorney for Debtor was holding pursuant to the turnover order in the Adversary
17 Proceeding. *Order on Chapter 7 Trustee's Motion Objecting to the Debtor's Claimed*
18 *Exemption in Certain Personal Property*, ECF 118, filed and entered on July 12, 2016.
19 Debtor's filing of amended schedules changing his claim of exemptions to the regular
20 California nonbankruptcy exemptions of C.C.P. § 704 on May 9, 2016 did not moot
21 Trustee's pending motion objecting to Debtor's claimed exemptions under the
22 bankruptcy-like exemptions of C.C.P. § 703.140(b) because Trustee timely filed a motion
23 objecting to Debtor's amended schedules choosing new exemptions on June 8, 2016,
24 which is this pending litigation. See 11 U.S.C. § 522(l) (providing in pertinent part that
25 unless a party in interest objects, the property claimed as exempt is exempt); Federal
26 Rule of Bankruptcy Procedure 4003(b) (a party in interest has 30 days to object to any
27 amendment of exemption); *Seror v. Kahan (In re Kahan)*, 28 F.3d 79, 81-82 (9th Cir.
28 1994).

1 Third, Debtor's amended homestead exemption, if allowed, would eliminate the
2 amount of equity from the sale of the Hawaiian Avenue property available to pay
3 administrative expenses and claims of creditors of the estate. If Debtor's \$75,000
4 homestead exemption is allowed, there would be no net equity (around \$66,804) that
5 Trustee realized from the sale of the Hawaiian Avenue property available to pay
6 administrative expenses of the estate and claims of creditors. As a result, Trustee would
7 be forced to absorb almost all of the administrative expenses incurred in the case, and
8 there would be no dividend for creditors. *Supplemental Declaration of Wesley H. Avery*
9 attached as exhibit to Trustee's *Reply to the Trial Declaration of Arturo Gonzalez in*
10 *Support of His Opposition to the Trustee's Objection to the Debtor's Exemption Filed as*
11 *Docket # 113*, ECF 133, filed and entered on July 29, 2016, at page 13 ¶ 8 ("The Estate
12 will be substantially prejudiced by reducing the funds available to pay creditors from
13 \$99,136.86 . . . to only \$44,804.00 thereby eliminating the Estate's ability to pay even a
14 substantial portion of the administrative claims in full.").

15 Fourth, Debtor's representations that he was claiming the personal property
16 exemptions pursuant to the California bankruptcy-like exemptions of C.C.P. § 703.140(b)
17 were material because he did not file his third amended bankruptcy schedules claiming
18 the alternate exemptions under C.C.P. § 704 for the first time until May 2016 after he was
19 allowed to retain and spend personal property assets based on his claimed C.C.P.
20 § 703.140(b) exemptions and after Trustee was induced to litigate Debtor's choice of the
21 C.C.P. § 703.140(b) exemptions when Trustee sought turnover of the personal property
22 assets claimed as exempt and to sell the Hawaiian Avenue property to realize value for
23 the bankruptcy estate and creditors by retaining counsel and a real estate broker. The
24 timing of Debtor's representations was material because his exemption elections
25 determined how Trustee administered the bankruptcy estate in this case. Had Debtor not
26 elected to claim exemptions for the personal property assets in the sales commissions
27 under the bankruptcy-like exemptions of C.C.P. § 703.140(b), not spent those assets,
28 and not engaged in litigation over his right to claim the C.C.P. § 703.140(b) exemptions,

Trustee would not have been induced to sell the Hawaiian Avenue property and incur administrative expenses in litigating these exemptions and selling the real property.

Trustee stated as follows:

I relied on the Debtor's representations in pleadings and declaration that he filed with the Court that he was exempting the Commissions I had no notice that the Debtor intended to switch exemptions to claim a homestead exemption until after I had arranged for the sale of Hawaiian [Avenue], when the Debtor filed the amended schedules on May 9, 2016. If the Debtor is allowed to claim an exception in Hawaiian [Avenue] now, it will substantially and adversely affect and damage the Estate. The Estate will not be able to pay its creditors.

Supplemental Declaration of Wesley H. Avery, attached as exhibit to *Trustee's Reply to the Trial Declaration of Arturo Gonzalez in Support of His Opposition to the Trustee's Objection to the Debtor's Exemption Filed as Docket # 113*, ECF 133, filed on July 29, 2016, at 12, ¶ 6.

Accordingly, the court determines that Trustee has proven by a preponderance of the evidence that the first element of equitable estoppel, representation or concealment of material fact, is met.

2. Made with Knowledge of the Materiality of Debtor's Acts

The party against whom estoppel is sought must have had knowledge of the facts. *Simmons v. Ghaderi*, 44 Cal.4th at 584; *accord In re Lua*, 692 Fed. Appx. at 852 (citing *Behnke v. State Farm General Insurance Co.*, 196 Cal.App.4th at 1462).

In this case, Trustee testified that he informed Debtor at the meeting of creditors on December 15, 2015 that Debtor was only entitled to choose exemptions under C.C.P. § 703 or § 704, but not both. *Avery Motion Declaration*, ECF 96 at 14-15, ¶ 6, *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit Z1, Trustee's Trial Exhibit 126*. The court finds this testimony to be credible, and this testimony is not disputed by Debtor. Thus, Debtor was aware of his exemption rights under both sets of exemptions under C.C.P. § 703.140(b) and § 704 and was being represented by counsel throughout most of the proceedings in this case relevant to his claims of exemptions. This indicates that Debtor's prior personal property exemption elections under the

1 bankruptcy-like set of exemptions of C.C.P. § 703.140(b) were made with knowledge of
2 the facts and with the intent to keep and use his sales commissions and other Long
3 Beach Realty assets through these exemption elections. Debtor stated to his attorney
4 through email communications on January 29, 2016 after the initial meeting of creditors,
5 "By the way, I am curious, when I went to the hearing the Trustee said, let's make a deal
6 because I couldn't keep both the home and the money from the corporation. My
7 understanding was that I had to let go of 1." *Email Communications attached to Debtor's*
8 *Trial Exhibit A, Debtor's Trial Sub-Exhibit A*. Considering the circumstances in this case,
9 the court determines that Debtor was talking about his choice of exemptions as to the
10 Hawaiian Avenue real property and the personal property sales commissions that he had
11 claimed as exempt the day before the meeting of creditors on December 15, 2015. This
12 statement shows that Debtor was aware that Debtor had to make a choice between
13 exempting the personal property sales commissions or the Hawaiian Avenue real
14 property, thus corroborating Trustee's testimony recounting that Trustee had informed
15 Debtor of this choice of exemptions at the December 15, 2015 meeting of creditors.
16 Thus, Debtor was aware of the materiality of the representations that he made by electing
17 personal property exemptions pursuant to the bankruptcy-like set of exemptions of C.C.P.
18 § 703.140 and electing not to claim a homestead exemption under the regular
19 nonbankruptcy set of exemptions of C.C.P. § 704.

20 Furthermore, Debtor testified at the further meeting of creditors on February 24,
21 2016 that he had received the funds from the personal property sales commissions and
22 spent these funds in the amount of \$20,200 which he had claimed as exempt pursuant to
23 C.C.P. § 703.140(b). *Avery Motion Declaration*, ECF 96 at 21 (document page 20), ¶ 19,
24 *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit Z1*,
25 *Trustee's Trial Exhibit 126*. At this time, as reflected on his bankruptcy schedules as
26 amended and in his representations to Trustee in his pleadings filed in this case, in his
27 testimony at the meetings of creditors and in his arguments at hearing in this case,
28 Debtor chose not to claim a homestead exemption or any other exemption pursuant to

1 C.C.P. § 704. Rather, Debtor knowingly and strategically elected an exemption pursuant
2 to the bankruptcy-like exemptions of C.C.P. § 703.140(b) in order to keep the sales
3 commissions and other Long Beach Realty assets for himself, namely because Debtor
4 had already spent the money from the sales commissions, or had planned to do so, prior
5 to his filing the first amended schedules on December 14, 2015, Debtor's First Amended
6 Schedule B-Personal Property and Amended Schedule C-Property Claimed as Exempt,
7 when he first disclosed additional sales commissions on his amended bankruptcy
8 documents on December 14, 2015 (i.e., the Oceanside and Banning sales commissions
9 not previously disclosed) and being examined by Trustee and creditors at the first
10 meeting of creditors on December 15, 2015.

11 Accordingly, the court determines that Trustee has proven by a preponderance of
12 the evidence that the second element of equitable estoppel, made with knowledge of the
13 facts, is met.

14 **3. To a Party Ignorant of the Truth**

15 To invoke equitable estoppel against Debtor, Trustee must also demonstrate that
16 Trustee was "ignorant, actually and permissibly, of the truth." *Simmons v. Ghaderi*, 44
17 Cal.4th at 584; *accord In re Lua*, 692 Fed. Appx. at 852 (citing *Behnke v. State Farm*
18 *General Insurance Co.*, 196 Cal.App.4th at 1462). In this case, Trustee filed an objection
19 to Debtor's exemptions claimed pursuant to C.C.P. § 703.140(b) and also filed an
20 adversary proceeding against Debtor contesting Debtor's personal property exemptions
21 claimed pursuant to C.C.P. § 703.140(b). The evidence indicates that at no time before
22 the filing of Debtor's third amended schedules in May 2016 was Trustee made aware of
23 Debtor's intention to claim a homestead exemption under C.C.P. § 704. *Avery Motion*
24 *Declaration*, ECF 96 at 20-21 (document pages 19-20), ¶¶ 22-24, *Trustee's Request for*
25 *Judicial Notice*, ECF 111, filed on June 20, 2016, *Exhibit Z1*, *Trustee's Trial Exhibit 126*.
26 The court finds this testimony of Trustee to be credible and corroborated by Debtor's
27 repeated arguments in opposition to Trustee's objections to Debtor's elections of
28 exemptions pursuant to C.C.P. § 703.140(b).

1 Trustee was ignorant of Debtor's intent to change his elections to claim a
2 homestead exemption because Debtor repeatedly asserted his right to claim personal
3 property exemptions pursuant to the bankruptcy-like set of exemptions of C.C.P.
4 § 703.140(b) that Debtor chose on his petition and bankruptcy schedules, in his
5 testimony at meetings of creditors, in his pleadings and oral arguments in litigation
6 proceedings in this case. *Avery Motion Declaration*, ECF 96 at 15-21 (document pages
7 14-20), ¶¶ 5-19, *Trustee's Request for Judicial Notice*, ECF 111, filed on June 20, 2016,
8 *Exhibit Z1, Trustee's Trial Exhibit 126*. On January 15, 2016, in his application to employ
9 Brett Curlee as counsel, Trustee referenced Debtor's assertion to claim personal property
10 exemptions pursuant to C.C.P. § 703. *Application of the Chapter 7 Trustee to Employ*
11 *the Law Offices of Brett Curlee as of 1/11/2016 as Counsel to the Chapter 7 Trustee*,
12 ECF 29 at 2, ¶ 4, *Trustee's Trial Exhibit 18* ("The Debtor claimed a California Code of
13 Civil Procedure § 703.140(b)(5) exemption of \$10,600.00 in the value of the bank
14 account and in the accounts receivable."). On February 3, 2016, Debtor filed his
15 opposition to Trustee's motion for preliminary injunction and turnover of the sales
16 commissions, asserting that Debtor was still claiming the C.C.P. § 703.140(b) exemptions
17 as would be indicated on Debtor's amended schedules to be filed the day afterwards on
18 February 4, 2016, that Debtor would only turn over assets not exempt under those
19 exemptions and that Debtor requested the court to rule on whether he (Debtor) had to
20 turn over to Trustee the remaining funds that Debtor was claiming as exempt pursuant to
21 C.C.P. § 703.140(b) as claimed on his further amended schedules. On February 10,
22 2016, Trustee in his reply to this pleading acknowledged Debtor's right to some
23 exemption under C.C.P. § 703.140(b) but objected to any amount over \$20,200 pursuant
24 to C.C.P. § 703.140(b)(5). On February 11, 2016, Trustee filed his motion specifically
25 objecting to Debtor's claimed personal property exemptions pursuant to C.C.P.
26 § 703.140(b), arguing that the exemption is limited to \$20,200 while the balance of
27 \$24,103 should be turned over to Trustee for the benefit of the estate. On February 17,
28 2016, at the hearing on Trustee's motion for preliminary injunction and turnover, Debtor

1 and Trustee agreed that of the \$44,804 of sales commissions listed on the amended
2 schedules filed on February 4, 2016, \$16,054 was not exempt and should be turned over
3 to Trustee, \$20,200 would not be required to be turned over based on Debtor's claimed
4 exemption pursuant to C.C.P. § 703.140(b)(5) claimed on the amended schedules filed
5 on February 4, 2016, and the amount of \$8,550 claimed as exempt on the amended
6 schedules pursuant to the "tools of the trade" under C.C.P. § 703.140(b)(6) remained in
7 dispute, but Altman as counsel for Debtor would hold such funds pending further order of
8 the court. On February 23, 2016, Debtor filed an opposition to Trustee's motion objecting
9 to his claimed personal property exemptions under C.C.P. § 703.140(b), arguing that he
10 had the right to claim an additional personal property exemption in \$8,550 of the sales
11 commissions as a "tool of the trade" pursuant to C.C.P. § 703.140(b)(6) because he
12 needed cash to run his business, and that the court should overrule Trustee's objections
13 to the claimed exemptions under C.C.P. § 703.140(b) in the motion. *Debtor's Opposition*
14 *to Trustee's Motion Objecting to the Debtor's Exemption in Personal Property Exemption*,
15 ECF 57, filed on February 23, 2016, *Trustee's Trial Exhibit 12*. As Debtor further argued
16 in this pleading referring to the claimed "tools of the trade" personal property exemption
17 pursuant to C.C.P. § 703.140(b)(6), the court should not disturb his choice of exemptions
18 because "Debtor should be given the benefit of the doubt in any question as to whether
19 an exemption is legitimately chose[n]." *Id.* at 5, *Trustee's Trial Exhibit 12*.

20 At the meeting of creditors conducted by Trustee on February 24, 2016, Debtor
21 testified that he received all the sales commissions that he previously listed as contingent
22 and that he already spent the \$20,200 in commissions that he claimed as exempt
23 pursuant to C.C.P. § 703.140(b)(5) that Trustee previously agreed that Debtor did not
24 have to turn over. At the evidentiary hearing on Trustee's motion objecting to Debtor's
25 claimed personal property exemptions under C.C.P. § 703.140(b) on March 8, 2016,
26 based on their agreement at the hearing on February 17, 2016, Debtor and Trustee
27 agreed that \$16,054 of the sales commissions was not exempt and had to be turned
28 over, \$20,200 was exempt as Debtor claimed on his amended schedules filed on

1 February 4, 2016 pursuant to C.C.P. § 703.140(b)(5) and that the balance of \$8,550
2 claimed as exempt under the “tools of the trade” exemption of C.C.P. § 703.140(b)(6)
3 remained in dispute, for which Debtor requested the court to issue findings of fact and
4 conclusions of law on this exemption, which the court did on July 12, 2016.

5 Debtor never claimed any exemption under the regular California nonbankruptcy
6 set of exemptions of C.C.P. § 704 or a homestead exemption until he filed his further
7 amended schedules on May 9, 2016, eight months after Debtor filed his bankruptcy
8 petition and original schedules on October 5, 2015. As described above, in the eight
9 months before Debtor changed his exemption election to the regular California
10 nonbankruptcy exemptions of C.C.P. § 704, Trustee and Debtor litigated Debtor’s rights
11 to claim the alternate bankruptcy-like exemptions of C.C.P. § 703.140(b) in Trustee’s
12 adversary proceeding for turnover of the personal property sales commissions and on
13 Trustee’s motion objecting to the C.C.P. § 703.140(b) exemptions in personal property
14 assets to conclusion, and Trustee filed a motion to employ a real estate agent to sell the
15 Hawaiian Avenue property. As evidenced by these litigation proceedings in this case
16 regarding Debtor’s election of personal property exemptions under the bankruptcy-like
17 set of exemptions of C.C.P. § 703.140(b), Trustee’s objections thereto, and Trustee’s
18 Adversary Proceeding for turnover of the sales commissions, Debtor was aware that he
19 had elected personal property exemptions under the bankruptcy-like set of exemptions of
20 C.C.P. § 703.140(b) rather than a homestead exemption under the regular California
21 nonbankruptcy exemptions of C.C.P. § 704. As the evidence indicates, Debtor knew that
22 he could not elect both sets of exemptions, and Debtor failed to give Trustee any reason
23 to anticipate or believe that Debtor intended to retract his election of the personal
24 property exemptions under C.C.P. § 703.140(b).

25 Accordingly, the court determines that Trustee has proven by a preponderance of
26 the evidence that the third element of equitable estoppel, to a party ignorant of the truth,
27 is met.

1 **4. With the Intention That the Ignorant Party Act on It**

2 To invoke equitable estoppel against Debtor, Trustee must also demonstrate that
3 Debtor made a representation “with the intention, actual or virtual, that the ignorant party
4 act on it.” *Simmons v. Ghaderi*, 44 Cal.4th at 584; *accord In re Lua*, 692 Fed. Appx. at
5 852 (citing *Behnke v. State Farm General Insurance Co.*, 196 Cal.App.4th at 1462).
6 Although equitable estoppel requires a finding of intent, Trustee need not prove that the
7 debtor intended to deceive him to create an equitable estoppel:

8 To create an equitable estoppel, it is enough if the party has been induced
9 to refrain from using such means or taking such action as lay in his power,
10 by which he might have retrieved his position and saved himself from loss.
 . . . Where the delay in commencing action is induced by the conduct of the
defendant it cannot be availed of by him as defense.

11 *Lantzy v. Centex Homes*, 31 Cal.4th 363, 384 (2003) (quoting *Vu v. Prudential Property &*
12 *Casualty Insurance Company*, 26 Cal.4th 1142, 1152-1153 (2001)); *accord In re Lua*, 529
13 B.R. at 777. An “estoppel may arise although there was no designed fraud on the part of
14 the person sought to be estopped.” *Lantzy v. Centex Homes*, 31 Cal.4th at 384 (quoting
15 *Vu v. Prudential Property & Casualty Insurance Company*, 26 Cal.4th at 1152); *see also*
16 *Crestline Mobile Homes Manufacturing Co. v. Pacific Finance Corp.*, 54 Cal.2d 773, 778-
17 779 (1960) (“Negligence that is careless and culpable conduct is, as a matter of law,
18 equivalent to an intent to deceive and will satisfy the element of fraud necessary to an
19 estoppel.”). Silence may be used as evidence of fraudulent intent. *In re Lua*, 529 B.R. at
20 777 (citing *R.D. Reeder Lathing Company, Inc. v. Allen*, 66 Cal.2d 373, 378 (1967)).

21 The preponderance of the evidence shows that Debtor intended to induce Trustee
22 to rely on his personal property exemption elections under the bankruptcy-like set of
23 exemptions of C.C.P. § 703.140(b) when he filed three different Schedule Cs electing
24 C.C.P. § 703.140(b) exemptions on October 5, 2015, December 14, 2015 and February
25 4, 2016. The preponderance of the evidence also shows that Debtor intended that the
26 Trustee act on these representations made by opposing and litigating his claim that he
27 was entitled to the remaining Commissions in dispute under the “tool of the trade
28 exemption” of C.C.P. § 703.140(b)(6). The court finds that Debtor also intended that

1 Trustee act on these representations because Debtor had already spent the amount of
2 \$20,200 in the Commissions that he received and claimed were exempt under the
3 bankruptcy-like set of exemptions of C.C.P. § 703.140(b) and induced Trustee to agree
4 that these funds were so exempt. This evidence shows that Debtor intended that Trustee
5 act on his representations that he was claiming personal property exemptions under
6 C.C.P. § 703.140(b) to concede Debtor's right to an exemption in the value of the
7 Commissions of \$20,200 in value and to have to object to the remaining amount not
8 exempt, and to sell the Hawaiian Avenue property for the benefit of the estate.

9 It was inequitable for Debtor to repeatedly claim personal property exemptions
10 under the bankruptcy-like set of exemptions of C.C.P. § 703.140(b), inducing Trustee to
11 litigate them to judgment, then for Debtor to claim a different set of exemptions under the
12 regular California nonbankruptcy set of exemptions of C.C.P. § 704 for a homestead
13 exemption, after litigating the first set of exemptions and not getting the results he wanted.
14 Debtor's actions resulted in Trustee incurring additional administrative expenses in
15 litigation and in the administrative insolvency of the estate since there would have been
16 insufficient assets to cover such expenses.

17 Accordingly, the court determines that Trustee has proven by a preponderance of
18 the evidence that the fourth element of equitable estoppel, with the intention that the
19 ignorant party act on it, is met.

20 **5. That Party Was Induced to Act on it**

21 To invoke equitable estoppel against Debtor, Trustee must also demonstrate that
22 Debtor made a representation on which "that party [i.e., the ignorant or other party] was
23 induced to act." *Simmons v. Ghaderi*, 44 Cal.4th at 584; *accord In re Lua*, 692 Fed.
24 Appx. at 852 (citing *Behnke v. State Farm General Insurance Co.*, 196 Cal.App.4th at
25 1462). This element of reliance requires that Trustee change his position in reliance on
26 something said or done by Debtor, resulting in detriment or prejudice to Trustee. *State*
27 *Compensation Insurance Fund v. Workers' Compensation Appeals Board*, 40 Cal.3d 5,
28 15 (1985).

1 As previously discussed, Trustee was unaware that Debtor would amend his
2 schedules to elect exemptions under a different set of exemptions and claim a
3 homestead exemption. Debtor was aware of Trustee's intent to sell the Hawaiian Avenue
4 property from January 15, 2016 when Trustee filed his application to employ the Law
5 Offices of Brett Curlee for the specific purpose of evaluating the equity and value of the
6 Hawaiian Avenue property. *Application of the Chapter 7 Trustee to Employ the Law*
7 *Offices of Brett Curlee as of 1/11/2016 as Counsel to the Chapter 7 Trustee*, ECF 29 at
8 3-5, ¶¶ 6-7, *Trustee's Trial Exhibit 18*. Trustee specifically stated in the Application that
9 "Trustee is informed and believes that there may be equity available in the Wilmington
10 Property [i.e., the Hawaiian Avenue property] that he can administer. . . . The Trustee
11 therefore intends to administer the real property of the Debtor, including but not limited to,
12 Wilmington and the assets of Long Beach Realty, Inc." *Id.* Debtor did not file an
13 objection to Trustee's application to employ counsel for these purposes.

14 Debtor repeatedly elected to exempt the Commissions under the personal
15 property exemptions under the bankruptcy-like set of exemptions of C.C.P. § 703.140(b)
16 and concededly spent some of this money based on these exemptions. Relying on
17 Debtor's representations claiming personal property exemptions and actions spending
18 money only exempt under the personal property exemptions, Trustee was induced to
19 believe that he could administer the bankruptcy estate by selling the Hawaiian Avenue
20 property, not claimed as exempt, which would bring into the estate around \$66,000 in net
21 equity (\$9,000 less than Debtor's claimed homestead exemption). Trustee would not
22 have incurred administrative expense in selling the Hawaiian Avenue property if Debtor
23 had initially claimed a homestead exemption because the homestead exemption would
24 have wiped out any equity for the estate (and would have administered the Commissions
25 instead). Thus, Trustee relied on Debtor's repeated representations that he was electing
26 personal property exemptions under the bankruptcy-like set of exemptions of C.C.P.
27 § 703.140(b), inducing him to incur significant administrative expenses, including \$91,000
28

1 for litigation of Debtor's C.C.P. § 703.140(b) exemptions and turnover of the
2 Commissions and for the sale of the Hawaiian Avenue property.

3 Debtor's argument in opposition to application of equitable estoppel here is that
4 the change in election of exemptions was part of a good faith legal strategy in support of
5 his motion to convert the case to one under Chapter 13 of the Bankruptcy Code.

6 *Debtor's Opposition to the Objection of the Chapter 7 Trustee to the Debtor's Claimed*
7 *Homestead Exemption in Real Property Located at 329 Hawaiian Avenue, Wilmington,*
8 *CA*, ECF 113, filed on June 24, 2016, at 4-8. Debtor argues that as to the second and
9 third equitable estoppel factors of knowledge of the fact that Trustee had the superior
10 knowledge because Trustee conducted the sale of the property "with the knowledge that
11 the Debtor's Motion to Convert was still in play." *Id.* at 5. Debtor further argues that "[i]f
12 approved, the Motion to Convert would supersede and obviate the sale," and "[t]he
13 Trustee knew this was in play and should not have relied upon his own prognostication
14 as to the results of the Motion to Convert." *Id.* This argument lacks merit since the
15 evidence indicates, as discussed above, that Trustee was induced to litigate Debtor's
16 personal property exemption claims under the bankruptcy-like set of exemptions of
17 C.C.P. § 703.140(b) regardless of the pending motion to convert, which Trustee was also
18 forced to litigate at great expense to the estate and which lacked merit since Debtor did
19 not offer admissible and credible evidence of eligibility to convert to Chapter 13 based on
20 regular income. *See Memorandum Decision and Order Denying Debtor's Motion to*
21 *Convert Case*, ECF 127, filed and entered on July 19, 2016. Until Debtor's motion to
22 convert was litigated and determined by the court, the parties asserted their respective
23 positions on Debtor's claimed exemptions as described herein, which was irrespective of
24 the outcome of the motion to convert and does not change the court's analysis of
25 Trustee's equitable estoppel claim.

26 Accordingly, the court determines that Trustee has proven by a preponderance of
27 the evidence that the fifth element of equitable estoppel, that the other party was induced
28 to act, is met.

1 **C. The Impact of *In re Lua***

2 On June 27, 2017, the United States Court of Appeals for the Ninth Circuit filed its
3 opinion in *In re Lua*, 692 Fed. Appx. 851 (9th Cir. 2017), which reversed the district
4 court's order affirming the bankruptcy court's order sustaining the objection of the
5 Chapter 7 trustee to the bankruptcy debtor's claimed homestead exemption. *In re Lua*,
6 692 Fed. Appx. 851 (9th Cir. 2017) (unpublished opinion), *reversing* 551 B.R. 448 (C.D.
7 Cal. 2015), *affirming* 529 B.R. 766 (Bankr. C.D. Cal. 2015).

8 In *In re Lua*, the debtor, a married woman, filed a Chapter 7 bankruptcy case for
9 herself, listing on her original bankruptcy schedules a 30% interest in the real property
10 where she and her husband resided and a \$75,000 homestead exemption in the property
11 pursuant to C.C.P. § 704.730(a)(1). *In re Lua*, 529 B.R. 766, 768 (Bankr. C.D. Cal.
12 2015). The debtor in *Lua* later filed her first amended bankruptcy schedules, removing
13 her claimed homestead exemption, indicating that she had no interest in the property,
14 other than such community property interest that may exist for purposes of a divorce
15 action, and stating that the property was owned by her husband and two other family
16 members. *Id.* at 769. Thus, instead of claiming a homestead exemption in property that
17 she then asserted she did not own, the debtor claimed exemptions in additional personal
18 property assets pursuant to C.C.P. § 702.140. After the Chapter 7 trustee investigated
19 the property and after the debtor deleted her homestead exemption, the trustee
20 concluded that Debtor's interest in the property could be monetized through a settlement
21 with the debtor's husband regarding the possible interest that Debtor had in the property,
22 which would be property of the estate, and the trustee retained counsel to negotiate a
23 settlement or pursue litigation with the husband. *Id.* Eventually, after litigation, the
24 trustee and the debtor's husband reached a settlement to sell the property to pay all
25 unsecured creditors in full and to divide the sales proceeds equally between the husband
26 and the bankruptcy estate after payment of liens, property taxes and costs of sale. *Id.* at
27 770. After the trustee incurred costs to retain counsel and establish the estate's interest
28 in the property and to retain a broker to sell the property, the debtor filed second

1 amended bankruptcy schedules, again claiming a community property interest in the
2 property and a homestead exemption in the property pursuant to C.C.P. § 704.730. *Id.* at
3 771. The trustee objected to Debtor's claimed homestead exemption, asserting bad faith,
4 estoppel, and laches, and the bankruptcy court held that the debtor was equitably
5 estopped from reasserting her homestead exemption because the trustee detrimentally
6 relied upon her representations in her first amended bankruptcy schedules that she was
7 not claiming any homestead exemption in incurring litigation and other costs in
8 administering the estate. *Id.* at 775-779. The district court affirmed the bankruptcy
9 court's decision. *In re Lua*, 551 B.R. 448 (C.D. Cal. 2015). However, on further appeal,
10 the Ninth Circuit reversed, holding that the debtor was not equitably estoppel from
11 claiming a homestead exemption in the property based on her failure to claim an
12 exemption in her first amended bankruptcy schedules. *In re Lua*, 692 Fed. Appx. at 852-
13 853.

14 In holding that the debtor in *Lua* was not equitably estopped from claiming a
15 homestead exemption, the Ninth Circuit explained that (1) the debtor's first amended
16 bankruptcy schedules could not form the basis of an estoppel because the schedules set
17 forth all the existing facts known to her and that the same facts were readily available to
18 the trustee who was thus fully aware of these facts because "where the person pleading
19 estoppel had knowledge of the facts, there is no reliance," 692 Fed. Appx. at 652 (quoting
20 *Sidebotham v. Robison*, 216 F.2d 816, 829 (9th Cir. 1954)); and (2) nothing in the
21 debtor's first amended schedules could be deemed a representation by her that she
22 would not amend her exemptions again if circumstances had changed, and the
23 circumstances changed when the bankruptcy court entered an order determining that the
24 property was community property despite title being in the name of the debtor's husband
25 and two other relatives, and not in the debtor's name, 692 Fed. Appx. at 652-653. The
26 existing facts then known to the debtor in *Lua* referred to her stated understanding that
27 the property was not hers since title was held in her husband and two other relatives, and
28 thus she would not be claiming a homestead exemption if she did not own an interest in

1 the property. *In re Lua*, 529 B.R. at 769. The circumstances changed when the
2 bankruptcy court entered an order in the case determining that the debtor in *Lua* did have
3 a community interest in the property, and thus she could claim a homestead exemption in
4 the property. *Id.*, 529 B.R. at 770; *see also In re Lua*, 692 Fed. Appx. at 853.

5 The facts in the present case are distinguishable from those in *Lua* for a number of
6 reasons. In *Lua*, as the Ninth Circuit observed, the debtor's representations on her first
7 amended bankruptcy schedules that she was not claiming a homestead exemption by
8 themselves cannot form the basis of an estoppel because the schedules set forth facts
9 that were readily available to the trustee in that case, and the trustee was fully aware of
10 them. 692 Fed. Appx. at 852. In contrast, in this case, Debtor's representations on his
11 various bankruptcy schedules that he was claiming only personal property exemptions
12 under the bankruptcy-like set of exemptions of C.C.P. § 730.140(b) did not set forth the
13 facts that he would be claiming the alternative regular California nonbankruptcy
14 exemptions, including a homestead exemption, under C.C.P. § 704, that would be readily
15 available to Trustee, so that Trustee would have been fully aware of the true facts. In this
16 case, Debtor repeatedly represented on his original, first, and second amended
17 bankruptcy schedules that he was claiming only the personal property exemptions of the
18 bankruptcy-like set of exemptions of C.C.P. § 703.140(b). Debtor testified under oath at
19 the continued meeting of creditors on December 15, 2015 that his statements on his
20 original and amended bankruptcy schedules were true and correct, including his claim of
21 the personal property exemptions under C.C.P. § 703.140(b), even though Trustee
22 advised Debtor that he could use either the personal property exemptions under the
23 bankruptcy-like exemptions of C.C.P. § 703.140(b) or the alternative exemptions,
24 including a homestead exemption, under regular California nonbankruptcy exemptions of
25 C.C.P. § 704, but not both. Similarly, Debtor or his counsel also made statements in
26 contested litigation regarding Trustee's adversary complaint for turnover of personal
27 property assets, monies from Debtor's real estate sales commissions, which complaint
28 Debtor expressly opposed on grounds that he claimed exemptions in these personal

1 property assets under the bankruptcy-like exemptions of C.C.P. § 703.140(b). In
2 contesting Trustee's motion for preliminary injunction for turnover of personal property
3 assets, Debtor argued that these assets should not be turned over to Trustee because
4 Debtor had a valid claim of exemption in these assets under C.C.P. § 703.140(b), and
5 based on such arguments, the court denied Trustee's motion in part because Debtor had
6 a valid claim of exemption to these assets under C.C.P. § 703.140(b) and allowed Debtor
7 to retain these assets, i.e., monies from real estate sales commissions in the amount of
8 \$20,200, pursuant to this claim of exemption under C.C.P. § 703.140(b). Debtor still
9 retains possession of these personal property assets of monies in the amount of \$20,200,
10 which he was allowed to retain pursuant to his claim of exemption under the bankruptcy-
11 like exemptions of C.C.P. § 703.140(b), even though his amended claim of exemption
12 under the alternate regular California nonbankruptcy exemptions of C.C.P. § 704 does
13 not allow him to retain the entire amount. Debtor, in numerous pleadings, asserted his
14 right to the exemptions that he claimed under C.C.P. § 703.140(b), which assertion was
15 to the exclusion of the alternative exemptions under C.C.P. § 704, and Trustee was
16 ignorant of the truth, a fact corroborated by Trustee's continued litigation against Debtor
17 based on Debtor's claimed personal property exemptions under C.C.P. § 703.140(b) in
18 Trustee's adversary proceeding for turnover and in Trustee's contested matter on his
19 motion objecting to Debtor's claimed personal property exemptions pursuant to C.C.P.
20 § 704.140(b). Thus, unlike in *Lua*, where the debtor only amended schedules without
21 litigating her right to choose certain exemptions, Debtor in this case litigated his choice of
22 the bankruptcy-like exemptions of C.C.P. § 703.140(b) to a final, nonappealable order,
23 which was not rendered moot by his amending his exemptions after litigating his original
24 choice of exemptions.

25 In *Lua*, the Ninth Circuit also held that "nothing in Lua's First Amended Schedules
26 can be deemed a representation by Lua that she would not amend her exemptions again
27 if circumstances changed." 692 Fed. Appx. at 853. Here, in this case, Debtor knowingly
28 and affirmatively represented to Trustee in litigation proceedings between them, and not

1 just on Debtor's schedules, that Debtor had chosen the exemptions under the set of
2 bankruptcy-like exemptions of C.C.P. § 703.140(b) and not chosen the alternate regular
3 California nonbankruptcy exemptions of C.C.P. § 704 as discussed above, and litigated
4 his choice of exemptions in contested litigation proceedings to a final, nonappealable
5 order, and Trustee had to litigate Debtor's choice of exemptions in costly contested
6 litigation. Debtor argues in this case that he should now be allowed to change his
7 exemptions due to changed circumstances: (1) Debtor originally argued that he and his
8 attorney talked about changing his exemptions in April 2016 because Debtor was
9 changing his legal position in the case in seeking a conversion of the case to Chapter 13,
10 Declaration of Arturo Gonzalez, Defendant's Trial Exhibit A; and (2) after, that is, the
11 postpetition increase in real property prices made his choosing different exemptions more
12 advantageous, *Brief*, filed October 3, 2018, ECF 350 at 20. As discussed below, these
13 circumstances are not proper changed circumstances within the meaning of *In re Lua*.

14 **D. Debtor's Arguments in Support of Amended Claim of Homestead**
15 **Exemption**

16 In support of his claim of a homestead exemption as amended and increased to
17 \$100,000, and in opposition to Trustee's objection, Debtor filed several versions of his
18 supplemental briefs, which set forth his arguments. Because it is unclear which of these
19 briefs is the primary one, the court has considered all versions in determining Debtor's
20 arguments.

21 Debtor first argues that creditors in this case knowingly filed time-barred claims,
22 which is against the Bankruptcy Code, and Trustee failed to perform his statutory duties
23 as the Chapter 7 trustee in not objecting to the time-barred creditor claims, which resulted
24 in "damage" to the case. *Brief*, filed October 3, 2018, ECF 350 at 9-13. According to
25 Debtor, the bankruptcy estate in this case was solvent as of January 15, 2016. *Id.* at 12-
26 13. Because the case proceeded "in error," Debtor argues that the case should be
27 evaluated based on what "any ordinary ethical professional person would have
28 proceeded." *Id.* at 13. In support of this argument, Debtor cites to 11 U.S.C. § 704(a)(5)

1 and the Trustee Handbook.⁴ The statute cited by Debtor, 11 U.S.C. § 704(a)(5), provides
2 that a Chapter 7 bankruptcy trustee “if a purpose would be served, [shall] examine proofs
3 of claim and object to the allowance of any claim that is improper.” 11 U.S.C.
4 § 704(a)(5). The Handbook for Chapter 7 Trustees states that “Section 704(a)(5)
5 requires a trustee to examine proofs of claim and object to the allowance of any claim
6 that is improper.” Handbook for Chapter 7 Trustees at 4-26. The Handbook for Chapter
7 7 Trustees further describes the timeframe for reviewing claims as follows: “The claims
8 review process commences after the trustee is certain that there will be a distribution to
9 creditors and as soon as possible following the expiration of the bar date for filing claims.
10 The trustee may not submit the final report (TFR) for a case prior to completion of the
11 claims examination and determination process.” *Id.* Also, with respect to timing of review
12 of claims, the Handbook for Chapter 7 Trustees further states, “The trustee should
13 perform a second review for new, tardy, amended or assigned claims prior to distribution.
14 See, especially, section 726(a)(1) regarding tardily filed priority claims. Tardily filed
15 claims may be paid under certain circumstances and should not be barred from payment
16 on that basis alone.” *Id.* at 4-28.

17 Debtor lists various reasons why he is entitled to a homestead exemption. *Brief*,
18 filed October 3, 2018, ECF 350 at 13-14. Debtor first argues that when he filed his
19 motion to convert the case to Chapter 13, he had an absolute right to convert the case
20 under 11 U.S.C. § 706(a), and Trustee denied Debtor his rights to due process in not
21 allowing Debtor to repay the only valid unsecured claim of \$765.76, the general
22 unsecured claim of the IRS. *Id.* at 13-14 (citing *Marrama v. Citizens Bank of*
23 *Massachusetts*, 549 U.S. 365 (2007) and Senate Report 95-989 and House Report 95-
24 595). Whether Debtor is entitled to a homestead exemption is not determined here by
25 whether he had a right to convert his case to Chapter 13. In this case, Debtor was

26 ⁴ The “Trustee Handbook” referred to by Debtor is the Handbook for Chapter 7 Trustees issued by the
27 Executive Office of United States Trustees, United States Department of Justice (October 2012 as revised),
28 which is available on the United States Department of Justice website at
<https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials>.

1 ineligible for Chapter 13. As recognized by the Supreme Court in *Marrama v. Citizens*
2 *Bank of Massachusetts*, a Chapter 7 bankruptcy debtor does not have an absolute right
3 under 11 U.S.C. § 706(a) to convert a case to Chapter 13 if he is not eligible for relief
4 under that chapter. Here, in this case, after an evidentiary hearing on Debtor's motion to
5 convert, the court determined that it could not grant Debtor's motion to convert and
6 denied the motion because Debtor failed to show that he had regular income to make
7 plan payments in a Chapter 13 case and was thus ineligible for Chapter 13. See
8 *Memorandum Decision and Order Denying Debtor's Motion to Convert Case*, ECF 127,
9 filed and entered on June 19, 2016.

10 Debtor then argues that Trustee was barred from proceeding with administering
11 the case in Chapter 7 because filing his motion to convert the case to Chapter 13 is an
12 order for relief under the Bankruptcy Code, 11 U.S.C. § 348(a), citing *In re Alpine Lumber*
13 *and Nursery*, 13 B.R. 977 (Bankr. S.D. Cal. 1981) and *Anderson v. Fuentes (In re*
14 *Fuentes)*, No. 6:13-bk-15309-MH Chapter 13 (Bankr. C.D. Cal., order converting case
15 from Chapter 7 to 13, filed and entered on October 10, 2013). *Brief*, filed October 3,
16 2018, ECF 350 at 15-16. Debtor quotes language from *In re Alpine Lumber and Nursery*
17 that "Section 348(e) of the Code (11 U.S.C. § 348(e)) provides that conversion of a case
18 under [section] 706, 1112, or 1307 of this title terminates the services of any trustee or
19 examiner that is serving in the case before such conversion." 13 B.R. at 978-979. In *In*
20 *re Fuentes*, in an order that did not state the reasons for its ruling, the bankruptcy court
21 granted the motion of the debtor to convert the case from Chapter 7 to Chapter 13
22 despite the Chapter 7 trustee's objections that the debtor only sought to convert the case
23 after the trustee took actions to liquidate the debtor's real property that was undervalued
24 on the bankruptcy petition and schedules and a tax refund that was wrongfully utilized by
25 the debtor. Order on Debtor's Motion to Convert Case under 11 U.S.C. §§ 706(a) or
26 1112(a), *In re Fuentes*, No. 6:13-bk-15309-MH Chapter 13 (Bankr. C.D. Cal., order
27 converting case from Chapter 7 to 13, filed and entered on October 10, 2013); Opposition
28 to Debtor's Motion to Convert Case under 11 U.S.C. Section 706(a); Declaration of Karl

1 T. Anderson, Chapter 7 Trustee, *In re Fuentes*, No. 6:13-bk-15309-MH Chapter 13
2 (Bankr. C.D. Cal., filed on August 21, 2013).

3 In this case, Debtor argues that whether he was qualified to convert to Chapter 13
4 “is not the point,” but that he was denied due process when Trustee proceeded to collect
5 his real estate sales commissions before the hearing on the motion to convert the case to
6 Chapter 13 on March 29, 2016. According to Debtor, by that time, Trustee would have
7 seen that there were only filed unsecured claims totaling \$765.76. *Id.* at 15. This
8 argument lacks merit because Debtor’s filing of a motion to convert his case is not an
9 order for relief within the meaning Section 348 of the Bankruptcy Code, 11 U.S.C.,
10 because conversion of the case upon a debtor’s motion to convert from Chapter 7 to
11 Chapter 13 pursuant to 11 U.S.C. § 706(a) does not legally occur until a motion to
12 convert is granted pursuant to Federal Rule of Bankruptcy Procedure 1017(f)(2), which
13 provides: “Conversion or dismissal under [11 U.S.C.] §§ 706(a) . . . shall be on motion
14 and filed and served as required by Rule 9013 [of the Federal Rules of Bankruptcy
15 Procedure].” See *a/so* Local Bankruptcy Rule 1017-1(a)(4) (“A debtor must request
16 conversion under 11 U.S.C. § 706(a) to a case under chapter 11, 12 or 13 by motion
17 which, unless otherwise ordered by the court, may be granted only after notice of
18 opportunity to request a hearing to the trustee, attorney for the trustee (if any), United
19 States trustee, and parties in interest, as provided in LBR 9013-1(o).”); *In re Dipalma*, 94
20 B.R. 546, 549 (Bankr. N.D. Ill. 1988). The cases cited by Debtor in support of his
21 argument (*In re Alpine Lumber and Nursery* and *In re Fuentes*) do not support his
22 argument because here, in this case, there was no conversion to Chapter 13 because
23 Debtor’s motion to convert was denied.

24 Debtor further argues that Trustee failed to properly investigate Debtor’s financial
25 affairs as required by 11 U.S.C. § 704, and that had Trustee properly investigated his
26 financial affairs, Trustee would have found that the filed creditor claims were time-barred,
27 which Trustee had a duty to object to. *Brief*, filed October 3, 2018, ECF 350 at 15-17.
28 According to Debtor, Trustee erred in administering this case because he failed to

1 investigate the time-barred claims and failed to object to these claims. *Id.* Debtor thus
2 argues that it was unnecessary for Trustee to administer the case in Chapter 7 to collect
3 the real estate commissions and to sell the residence to realize equity to pay claims,
4 given the small amount of allowable unsecured claims. *Id.* Debtor argued, “Debtor
5 should be entitled to a Homestead exemption based on the facts and evidence and the
6 events that occur. Furthermore, trustee made an error in never objecting to time barred
7 claims and this was the start of beginning unnecessary matters including proceeding with
8 the adversary proceeding as the trustee would have known that he was proceeding
9 unnecessarily as trustee didn’t need to worry about secured claims in all there was an
10 unsecured claim[] was \$765.76 in an unsecured claim that could have easily been paid
11 off.” *Id.* at 21.

12 According to Debtor, Trustee should have objected to the unsecured claims of
13 Discover Bank and Western Federal Credit Union because their claims for contract were
14 barred by statutes of limitation under state law, and disallowance of these claims would
15 have meant that the only allowed unsecured claim would be the IRS claim for \$765.76,
16 which means by Debtor’s calculations, the estate would have been solvent, and there
17 would have been no need for Trustee to take action against Debtor to collect the personal
18 property assets in the sales commissions and to sell Debtor’s homestead property, and
19 such action by Trustee was in error. *Id.* at 9-17.

20 In his declaration in support of his supplemental brief filed on September 19, 2018,
21 ECF 340, Trustee addresses this argument of Debtor:

22 22. The Debtor argues the Trustee should not have continued with
23 litigation after March 21, 2016 because there was only one unsecured claim, the
24 claim of the IRS for \$765.56, as of the claims bar date. Although only one
25 unsecured claim was filed as of March 31, 2016, by the IRS for \$765.76, as a
26 result of the Debtor’s conduct before the claims bar date, the Trustee incurred
27 \$33,400.52 in professional fees and costs as of March 30, 201[6] due to Debtor’s
28 refusal to turn over Commissions and \$53,768.48 as of June 1, 2016. Had the

1 Trustee known that Debtor would attempt to switch his exemptions he would have
2 never agreed to Debtor's exemptions of \$20,200 in the Commissions under *C.C.P.*
3 *§ 703.140(b)(5) and (b)(1)* as part of the turnover judgment.

4 23. As repeated again and again by the Trustee throughout the course of
5 these proceedings, had Debtor simpl[y] complied with his demand to turn over the
6 Commissions instead of forcing the Trustee to engage in heavy litigation to
7 recover them, there would have been funds to pay creditors 100% on their claims,
8 including, not only the administrative claims of the Trustee and his professionals
9 as of March 31, 2016, but the allowed unsecured claim of the IRS for \$765.76 and
10 the allowed FTB [Franchise Tax Board] proof of claim, filed August 18, 2016,
11 which included an allowed unsecured priority claims for \$3,926.14 and an allowed
12 unsecured claim of \$1,974.03.

13 24. Total funds in the Trustee's possession as of March 31, 2016 was
14 \$16,054, hardly sufficient to pay \$33,400.52 in professional fees and costs as of
15 March 31, 201[6], plus allowed claims of the IRS and the FTB totaling \$6,665.93.
16 The Trustee did not receive the other \$8,550 until July 22, 2016, when Debtor
17 complied with the order denying his "tools of the trade exemption" [pursuant to
18 *C.C.P. § 703.140(b)(6)*], which still left the Estate with only \$24,604 to pay claims
19 totaling \$40,066.45 (presuming attorney fees and costs incurred between March
20 31, 201[6] and July 18, 2016 are not included).

21 25. The Debtor's argument at the hearing that he would have turned over
22 the funds is a matter for speculation. The facts show the Debtor showed up at the
23 continued 341a creditors meeting on February 24, 2016 and testified that he spent
24 all of the non-exempt pre-bankruptcy Commissions. All that was left was the
25 \$24,604 the Trustee had recovered.

26 26. The Court pointed out at the hearing on August 23, 2018 that the FTB
27 did not file its proof of claim until August 19, 2016 and the only allowed proof of
28 claim against the Estate as of the March 21, 2016 claims bar date was the IRS

1 proof of claim for \$765.76. As a result of Debtor dissipating Commissions and his
2 refusal to cooperate with the Trustee in January of 2016, over 2 months prior to
3 the expiration of the claims bar date, the Trustee was required to proceed with
4 litigation based on unsecured claims listed in Debtor's 'Schedule F-Creditors
5 Holding Unsecured Nonpriority Claims' totaling \$97,045, none of which claims
6 were identified as disputed, contingent, or unliquidated prior to the Claims bar
7 date.

8 27. The Debtor's argument the FTB had not filed a proof of claim by March
9 21, 2016 is not persuasive. 'Schedule D-Creditors Holding Secured Claims' shows
10 the FTB held an undisputed unsecured claim for \$1,819 and the IRS has an
11 undisputed unsecured claim for \$7,966. [RJN, 2nd Motion, Ex. 1, pp. 45-46] If
12 there are non-exempt assets available to pay creditor claims, his [i.e., Trustee's]
13 duty is to liquidate Estate assets to pay creditors. Although the FTB proof of claim
14 was filed in August of 2016, the Estate is no less obligated to honor and pay that
15 proof of claim in accordance with the Bankruptcy Code if sufficient assets are
16 available that can be liquidated to pay that claim. There is also no case law
17 allowing a chapter 7 trustee to refuse to pay all or part of a proof of claim because
18 he has determined not to pursue non-exempt property or because he chooses not
19 to collect and liquidate assets necessary to pay all the claims when such assets
20 are available as there were here.

21 28. What is disingenuous about Debtor's argument, is that he showed up at
22 the February 24, 2016 continued 341a meeting of creditors and stated that all
23 \$20,200 of the exempt Commissions he received were spent leaving the Estate
24 with insufficient funds to pay creditors regardless of whether the FTB or IRS claims
25 are counted. [2nd Motion, Avery Decl., ¶ 20; 1st Motion, Avery Decl., ¶ 19; See
26 *also* 2nd Motion, Declaration of John J. Menchaca, ¶¶ 1-4, Ex "30"]

27 29. As a result of Debtor's conduct, he rendered the Estate insolvent at all
28 times during this bankruptcy case. As of March 31, 2016, the Estate had incurred

1 professional fees and costs totaling \$33,400.52, which was for more than the
2 \$16,054 the Trustee held on that date or the \$24,604 on hand as of July 22, 2016.
3 As of June 1, 2016, the Estate had incurred administrative claims totaled
4 \$53,768.48, without including allowed IRS or FTB proofs of claim ver[sus] the
5 estate receiving only \$24,604 in funds as of July 22, 2016. Debtor made his
6 election, received the benefit thereof, and must not be allowed to switch as a result
7 of the damages caused to the Estate.

8 *Avery Declaration, Supplemental Brief of the Chapter 7 Trustee Pursuant to Order of the*
9 *Court Entered September 5, 2018, ECF 340 at 8-11.*

10 In determining whether Debtor has a valid defense to Trustee's equitable estoppel
11 argument based on Trustee's alleged failures of duty under 11 U.S.C. § 704(a)(5) and the
12 Handbook for Chapter 7 Trustees, the evidence supports Trustee's position that he was
13 acting in accordance with his duties under 11 U.S.C. § 704, including 11 U.S.C.
14 § 704(a)(5), and the Handbook for Chapter 7 Trustees. The evidence indicates that
15 Trustee was acting in performance of his duties under 11 U.S.C. § 704, notably, his duty
16 to collect and reduce to money the property of the estate for which he serves and to close
17 the estate as expeditiously as is compatible with the best interests of parties in interest
18 pursuant to 11 U.S.C. § 704(a)(1). Trustee examined Debtor at the meeting of creditors
19 on December 15, 2015, at which hearing Debtor testified under oath that his petition and
20 schedules were complete, true, and accurate, including his listing of assets and election
21 of exemptions on his personal property assets pursuant to the bankruptcy-like set of
22 exemptions of C.C.P. § 703.140(b). However, Trustee learned that as of January 15,
23 2016, Debtor was dissipating funds from sales commissions that he earned prepetition
24 but received postpetition, which were assets of the bankruptcy estate pursuant to 11
25 U.S.C. § 541(a)(1), without Trustee's knowledge and authorization. Debtor has duties
26 under 11 U.S.C. §§ 521(a)(1), (3) and (4) to completely and accurately list his assets on
27 his bankruptcy schedules, to cooperate with Trustee in the administration of the estate
28 and to surrender estate property and any recorded information relating to estate property,

1 and Debtor was not complying with those duties because Debtor did not list all of his
2 prepetition sales commissions on his bankruptcy schedules and was spending and
3 dissipating these assets.

4 Trustee's actions to stop Debtor from dissipating the sales commissions were
5 reasonable and necessary in order for Trustee to comply with his duty to collect and
6 reduce to money property of the estate in light of his knowledge that the estate had
7 potential unsecured claims based on Debtor's scheduled unsecured debts of \$97,045
8 listed on his schedules, none of which was listed as unliquidated, contingent or disputed.
9 Trustee had to act to stop Debtor from dissipating estate assets to protect the interests of
10 creditors who still had time to file timely proofs of claim because the general claims bar
11 date was two months later on March 21, 2016. While it became known later that creditor
12 claims that were timely filed were far less than the debt that Debtor scheduled on his
13 petition and schedules, Trustee had no way of knowing that until the claims bar date
14 passed on March 21, 2016.

15 Trustee had acted reasonably to request turnover because not all of the
16 prepetition personal property assets that Debtor possessed and did not turn over to the
17 estate were claimed as exempt under his claimed personal property exemptions pursuant
18 to C.C.P. § 703.140(b) on his bankruptcy petition and schedules through March 2016:
19 (1) Debtor on his petition and schedules filed on October 5, 2015 claimed only a \$11,000
20 exemption in Long Beach Realty assets (including the \$9,500.00 commission from the W
21 L Street sale) pursuant to C.C.P. § 703.140(b)(5) while the Banning commission of
22 \$20,178.00 and the Oceanside commission of \$14,625.00 were not listed as assets on
23 the petition and these schedules; (2) Debtor on his first amended schedules filed on
24 December 14, 2015 claimed exemptions in his Long Beach Realty assets pursuant to
25 C.C.P. § 703.140(b)(6), but none of the \$44,303.00 in sales commissions for W L Street
26 (\$9,500.00), Banning (\$20,178.00) and Oceanside (\$14,625.00) listed as "contingent"
27 were claimed as exempt; and (3) Debtor on his amended schedules filed on February 4,
28

1 2016 claimed partial exemptions of \$21,125.00 and \$7,625.00 in the sales commissions
2 of \$44,303.00 pursuant to C.C.P. § 703.140(b)(5) and (6).

3 Meanwhile, Debtor was spending and dissipating these sales commissions, assets
4 of the bankruptcy estate, for his personal and business purposes to the detriment of the
5 estate without claiming them as entirely exempt, prompting Trustee's action to collect and
6 recover estate property as he has a duty to do pursuant to 11 U.S.C. § 704(a)(1). As
7 Trustee argues, because Debtor was acting contrary to his duties under the Bankruptcy
8 Code to cooperate with Trustee and surrender estate property to Trustee, the evidence
9 does not support Debtor's argument that Trustee was acting contrary to his duties to
10 investigate Debtor's financial affairs and examine and object to claims under 11 U.S.C.
11 § 704(a)(4) and (5) by not objecting to the claims of Discover Bank and Western Federal
12 Credit Union. The estate would not have otherwise been solvent due to the claims
13 actually filed by the IRS and Franchise Tax Board and the claims arising from the
14 administrative expenses in litigation incurred by Trustee in taking reasonable and
15 necessary action to recover estate property from Debtor, which Debtor should have
16 disclosed and surrendered to Trustee pursuant to 11 U.S.C. § 521(a)(1), (3) and (4).

17 Debtor argues that because Trustee had filed an adversary proceeding for
18 turnover of real estate sales commissions, Debtor's attorney amended Debtor's
19 schedules on February 3, 2016 to claim the commissions as exempt because as of
20 January 15, 2016, Debtor had not claimed the homestead nor the commissions totaling
21 \$44,303 as exempt. *Brief*, filed October 3, 2018, ECF 350 at 20. According to Debtor,
22 Trustee's turnover action was unnecessary because Debtor had no bona fide creditors
23 that actually lent him money, and thus Debtor was solvent. *Id.* According to Debtor, his
24 attorney amended the schedules to increase the exemption for the commissions based
25 on the thinking that there was not enough equity in the residence and that a purchase of
26 the residence could not be financed by a first-time home buyer through an FHA loan, but
27 for fraud through a second appraisal of the property. *Id.* Debtor argues that like in *In re*
28 *Lua*, he should be allowed to "switch" (or amend) exemptions. *Id.* at 25. Debtor argues

1 that he should be allowed a homestead exemption under C.C.P. § 704 because of the
2 rapidly increasing value of the residence in the market. *Id.* According to Debtor, the
3 rapidly increasing value of the residence between January and May 2016 reflected in an
4 initial offer of \$375,000 from the buyer is a changed circumstance that justifies his
5 amendment of his schedules to claim a homestead exemption where he had not claimed
6 one before. *Id.* at 25-27. Debtor stated that he obtained an appraisal of the residence at
7 \$275,000 in September 2015 before he filed for bankruptcy, that Trustee's real estate
8 agent had appraised the property at \$355,000 in January 2016, but without noting
9 "Cancer Risks" and that the buyer's first appraiser valued the property at \$400,000 with
10 "Cancer Risks." *Id.* at 26. According to Debtor, he had to claim a homestead exemption
11 to minimize his loss of equity in the residence. *Id.* at 27. Debtor argues that previously,
12 he and his attorney did not believe that he needed to exempt the residence because they
13 anticipated that the residence would not be sold since values were not rising and it was
14 unlikely that a first-time buyer would qualify for an FHA loan. *Id.* As discussed above, the
15 circumstances claimed by Debtor to be changed circumstances are unlike those in *Lua*
16 where Debtor did not consider that she had an interest in her residence because it was
17 titled in the name of her husband and two other relatives to claim a homestead exemption
18 and only after litigation brought by the trustee in that case, the court determined that she
19 did have a community property interest in the residence so she could claim a homestead
20 exemption. In this case, Debtor always knew that he had a choice between taking a
21 homestead exemption or not by choosing either the bankruptcy-like exemptions of C.C.P.
22 § 703.140(b) or the regular California nonbankruptcy exemptions of C.C.P. § 704. Debtor
23 chose to litigate his right to the bankruptcy-like exemptions of C.C.P. § 703.140(b), and
24 the evidence indicates that the changed circumstance here is that he did not like the
25 result of the litigation of his right to claim such exemptions, so he attempted to change to
26 the other set. As discussed above, based on principles of equitable estoppel, Debtor
27 may not "switch" exemptions because he had repeatedly represented to Trustee that he
28 was claiming the bankruptcy-like exemptions of C.C.P. § 703.140(b) instead of the C.C.P.

1 § 704 regular nonbankruptcy exemptions, which induced Trustee to incur substantial
2 litigation costs over Debtor's claim of the C.C.P. § 703.140(b) exemptions.

3 **E. Debtor's "Tools of the Trade" Exemption**

4 On Debtor's amended schedules filed on May 9, 2016 and December 12, 2017, he
5 claimed a "tools of the trade" exemption pursuant to C.C.P. § 704.060(a)(1) of the regular
6 California bankruptcy exemptions of C.C.P. § 704. Previously, on his amended
7 schedules filed on February 4, 2016, Debtor claimed a "tools of the trade" exemption
8 pursuant to C.C.P. § 703.140(b)(6), which is one of the bankruptcy-like exemptions of
9 C.C.P. § 703.140(b), in the amount of \$7,625.00 in his business equipment valued at
10 \$400.00 and in his sales commissions valued at \$44,303.00. Based on Trustee's motion
11 objecting to Debtor's exemption of certain personal property assets, including the "tools
12 of the trade" exemption, filed on February 11, 2016, the court disallowed Debtor's
13 claimed "tools of the trade" under C.C.P. § 703.140(b)(6), setting forth its decision in its
14 findings of fact and conclusions of law. *Findings of Fact and Conclusions of Law re:*
15 *Motion by the Chapter 7 Trustee to the Debtor's Claimed Exemption for Certain Personal*
16 *Property Assets*, ECF 119, filed on July 12, 2016; *Order on Motion by the Chapter 7*
17 *Trustee to the Debtor's Claimed Exemption for Certain Personal Property Assets*, ECF
18 118, filed on July 12, 2016. Debtor argued that his sales commission funds were working
19 capital and exempt as "tools of the trade" of the Debtor under C.C.P. § 703.140(b)(6),
20 and the gist of the court's ruling was that these funds are not exempt because the funds,
21 though arguably working capital, cannot be considered "tools of the trade" which should
22 be construed to be "those tools, equipment, and other items of tangible property which
23 are reasonably necessary and actually used by a judgment debtor in pursuing his
24 livelihood." *Id.* (citing *C.F. Nielsen, Inc. v. Stern*, 11 Cal.App.4th Supp. 22 (1992) (holding
25 funds in a lawyer's business bank account not "tools of the trade" under CCP
26 704.060(a)); and *Kono v. Meeker*, 196 Cal.App.4th 81 (2011) (inventory is not "tools of
27 the trade" under CCP 704.060 because intent of statute is to protect basic tools and
28 utensils necessary to aid the debtor in continuing in his means of livelihood)). Money as

1 a medium of exchange is not within the meaning of tangible personal property to be
2 considered a basic tool, utensil and piece of equipment necessary for a trade. *Id.* Thus,
3 the court disallowed Debtor's "tools of the trade" exemption in the sales commissions but
4 allowed the exemption as to the business equipment valued at \$400. *Id.* The court's
5 order on Debtor's "tools of the trade" exemption claimed on his amended schedules filed
6 on February 4, 2016 pursuant to the bankruptcy-like exemptions of C.C.P.

7 § 703.140(b)(6) is a final, non-appealable order.

8 On his amended schedules filed on May 9, 2016, Debtor claimed a "tools of the
9 trade" exemption pursuant to C.C.P. § 704.060(a)(1), which is one of the regular
10 California nonbankruptcy exemptions of C.C.P. § 704, in the amount of \$7,625.00 in his
11 business equipment valued at \$400.00 and in his sales commissions valued at
12 \$44,303.00. Based on Trustee's motion objecting to Debtor's exemption of certain
13 personal property assets, including the "tools of the trade" exemption, filed on June 8,
14 2016, the court disallowed Debtor's claimed "tools of the trade" under C.C.P.
15 § 704.060(a)(1), setting forth its reasons in its memorandum decision filed on June 27,
16 2017. *Memorandum Decision on Debtor's Claim of a "Tools of the Trade" Exemption*
17 *under California Code of Civil Procedure § 704.060(a)(1) Relating to the Contested*
18 *Matter of Chapter 7 Trustee's Motion Objecting to Debtor's Claimed Homestead*
19 *Exemption in Real Property Located at 329 Hawaiian Avenue, Wilmington, CA, ECF 204,*
20 *filed on June 27, 2017; Order on Debtor's Claim of a "Tools of the Trade" Exemption*
21 *under California Code of Civil Procedure § 704.060(a)(1) Relating to the Contested*
22 *Matter of Chapter 7 Trustee's Motion Objecting to Debtor's Claimed Homestead*
23 *Exemption in Real Property Located at 329 Hawaiian Avenue, Wilmington, CA, ECF 205,*
24 *filed on June 27, 2017.* As previously noted, the court granted reconsideration of this
25 order when it granted reconsideration of the order on Debtor's claimed homestead
26 exemption. Debtor reasserted his claim for a "tools of the trade" exemption pursuant to
27 C.C.P. § 704.060(a)(1) on his amended schedules filed on December 12, 2017.

1 In reconsideration of the prior order on Debtor's "tools of the trade" exemption
2 claimed pursuant to C.C.P. § 704.060(a)(1) on his amended schedules filed on May 9,
3 2016 and consideration of Debtor's same claim of exemption on his amended schedules
4 filed on December 12, 2017, the court determines that its prior decision of June 27, 2017
5 on this exemption was correct and readopts that decision as its ruling on Debtor's "tools
6 of the trade" exemption under C.C.P. § 704.060(a)(1) on Debtor's amended schedules
7 filed on May 9, 2016 and on December 12, 2017. Moreover, the court determines that
8 Debtor may not claim the "tools of the trade" exemption of C.C.P. § 704.060(a)(1) for the
9 same reasons that the court has determined above that he is equitably estopped from
10 claiming the regular California nonbankruptcy exemptions of C.C.P. § 704, including the
11 homestead exemption of C.C.P. § 704.730. However, the court determines that Debtor
12 may properly claim the "tools of the trade" exemption in his business equipment valued at
13 \$400.00 as the court previously determined in its order and findings of fact and
14 conclusions of law of July 12, 2016 on Debtor's "tools of the trade" exemption claimed
15 under C.C.P. § 703.140(b)(5) and will allow the "tools of the trade" exemption in the
16 amount of \$400.00.

17 III. CONCLUSION

18 Because the court finds that all five elements of equitable estoppel under
19 California law are shown on this evidentiary record as discussed above, the court hereby
20 grants Trustee's Motion objecting to Debtor's claimed homestead exemption in real
21 property located at 329 Hawaiian Avenue, Wilmington, California, and objecting to
22 Debtor's "tools of the trade" exemption and disallows the homestead exemption claimed
23 under C.C.P. § 704.730 and the "tools of the trade" exemption claimed under C.C.P. §
24 704.060(a)(1), except the court denies the Motion in part as to the value of Debtor's

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1 business equipment in the amount of \$400.00. Trustee is hereby ordered to lodge a
2 proposed form of judgment consistent with this memorandum decision.

3 IT IS SO ORDERED.

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23 Date: March 27, 2019



24 Robert Kwan
25 United States Bankruptcy Judge
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